No. 01-651-CFX Title: JPMorgan Chase Bank, Petitioner
v.
Traffic Stream (BVI) Infrastructure Limited

Docketed: October 23, 2001 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Oct 19 2001	Petition for writ of certiorari filed. (Response due November 22, 2001)
	Nov 21 2001	Motion of Govmt. of United Kingdom of Great Britain and No. Ireland for leave to file a brief as amicus curiae filed.
	Nov 23 2001	Brief amicus curiae of United States filed.
	Nov 28 2001	DISTRIBUTED for Conference of January 4, 2002
	Dec 5 2001	Response requested.
	Dec 12 2001	REDISTRIBUTED for Conference of January 4, 2002
	Jan 4 2002	Motion of Govmt. of United Kingdom of Great Britain and No. Ireland for leave to file a brief as amicus curiae GRANTED.
	Jan 4 2002	Petition GRANTED. SET FOR ARGUMENT April 17, 2002. **********
	Feb 19 2002	Motion of the Solicitor General leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 19 2002	Brief amicus curiae of United States filed.
	Feb 19 2002	Joint appendix filed.
	Feb 19 2002	Brief of petitioner Chase Manhattan Bank filed.
	Feb 19 2002	LODGING consisting of twenty bound copies of lower court documents submitted by counsel for the petitioner.
	Feb 19 2002	Brief amicus curiae of United Kingdom of Great Britain and Northern Ireland filed.
	Mar 11 2002	Record filed.
	Mar 15 2002	Record filed.
	Mar 20 2002	CIRCULATED.
	Mar 22 2002	Brief of respondent Traffic Stream (BVI) Infrastructure Limited filed.
	Apr 1 2002	Motion of the Solicitor General leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 10 2002	Reply brief of petitioner JPMorgan Chase Bank filed.
	Apr 17 2002	ARGUED.

Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

THE CHASE MANHATTAN BANK, as Indenture Trustee, under the Indenture, dated as of May 6, 1998,

Petitioner,

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals for the Second Circuit err when it held, contrary to the holdings of the Third, Fourth and Seventh Circuits, that citizens of the British Overseas Territories, such as Bermuda and the British Virgin Islands, were not "citizens or subjects of a foreign state" for the purposes of alienage jurisdiction and thus could not maintain an action in Federal Court under 28 U.S.C. § 1332(a)(2)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Petitioner, The Chase Manhattan Bank ("Chase") states that it is wholly-owned by J.P. Morgan Chase & Co., a publicly-owned company.

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The Per Curiam Opinion of the United States Court of Appeals for the Second Circuit in *The Chase Manhattan Bank, as Indenture Trustee, under the Indenture, dated as of May 6, 1998 v. Traffic Stream (BVI) Infrastructure Limited* is reported at 251 F.3d 334 (2d Cir. 2001) and set forth in the Appendix hereto (App. 1a-7a).

The Memorandum Opinion and Order of the United States District Court for the Southern District of New York in *The Chase Manhattan Bank, as Indenture Trustee, under the Indenture, dated as of May 6, 1998 v. Traffic Stream (BVI) Infrastructure Limited* is reported at 2000 WL 573232 (S.D.N.Y. May 8, 2000) and set forth in the Appendix hereto (App. 8a-14a).

The Opinion and Order of the United States District Court for the Southern District of New York in *The Chase Manhattan Bank, as Indenture Trustee, under the Indenture, dated as of May 6, 1998 v. Traffic Stream (BVI) Infrastructure Limited* is reported at 86 F. Supp. 2d 244 (S.D.N.Y. 2000) and set forth in the Appendix hereto (App. 15a-54a).

BASIS FOR JURISDICTION

The United States Court of Appeals for the Second Circuit reversed the Final Judgment of the District Court for the Southern District of New York on May 24, 2001 (App. 1a-7a). On July 24, 2001, the United States Court of Appeals for the Second Circuit denied Chase's timely filed petition for rehearing *en banc* (App. 55a-56a). This petition for a writ of certiorari is filed within 90 days from the date of the denial of the petition for rehearing *en banc*. 28 U.S.C. § 2101(c); SUP. CT. R. 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1332(a):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —
>
> (1) citizens of different States;

> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
>
> For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

STATEMENT OF THE CASE

In May 1998, Traffic Stream (BVI) Infrastructure Limited ("Traffic Stream"), a corporation organized under the laws of the British Virgin Islands, raised $119,000,000 in the United States debt markets by entering into an Indenture, pursuant to which Traffic Stream issued its 14¼% Senior Secured Notes due 2006, to holders of the Notes. The Chase Manhattan Bank ("Chase"), a corporation existing under and by the laws of the State of New York and authorized to exercise trust powers, entered into the Indenture with Traffic Stream and agreed to serve as Trustee. (JA 20-144)[1] The Indenture stated that "[Traffic Stream] irrevocably submits to the jurisdiction of any court of the State of New

---

1. References hereinafter to "JA __" are to pages in the Joint Appendix which was filed in the Second Circuit Court of Appeals.

York or any United States federal court sitting in the Borough of Manhattan, New York City, New York, United States . . . ." (JA 58)

Beginning in January 1999, Traffic Stream committed multiple "Events of Default", as defined in the Indenture, including the failure to pay the semi-annual interest payment due in May 1999. (JA 12-15) Chase commenced this action on June 4, 1999, in the United States District Court for the Southern District of New York, seeking, among other things, a turnover of certain collateral in New York held by Chase, as Trustee, and a deficiency judgment. (JA 18) Traffic Stream, in its amended answer, admitted the Events of Default, but asserted that its performance to pay any amount under the Indenture was excused based on the impossibility defense. (JA 165-75) Chase moved for summary judgment. (JA 196-97)

Summary judgment was granted by the district court in an opinion and order dated January 31, 2000. *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 86 F. Supp. 2d 244 (S.D.N.Y. 2000) (Hon. Shira Scheindlin). The district court ordered Chase to foreclose on the collateral, which exceeded $47 million, before submitting its proposed deficiency judgment. *Id.* at 262. The district court issued a second opinion on May 8, 2000, in order to resolve certain disputes about the appropriate deficiency judgment. *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, No. 99 Civ. 4056 (SAS), 2000 WL 573232 (S.D.N.Y. May 8, 2000).

Traffic Stream appealed to the Second Circuit, raising only the issues regarding the impossibility defense in its brief. At the oral argument before the Second Circuit Panel on December 1, 2000, the Panel raised the issue of whether

subject matter jurisdiction existed under 28 U.S.C. § 1332(a)(2) in light of the fact that the defendant Traffic Stream was incorporated in a United Kingdom Overseas Territory, namely the British Virgin Islands. The Panel referred the parties to three recent cases in which the Second Circuit found that residents and corporations from other United Kingdom Overseas Territories, namely Hong Kong (prior to its transfer to the People's Republic of China) and Bermuda, were not "citizens or subjects of a foreign state" for purposes of alienage jurisdiction.

After the parties submitted supplemental briefing on this issue, the Second Circuit, on May 24, 2001, held that there was no alienage jurisdiction for residents or corporations from the British Virgin Islands because such residents or entities were "stateless" due to the fact that the United States does not regard the British Virgin Islands as an independent, sovereign political entity. The Second Circuit rejected the argument that the residents and individuals from the British Virgin Islands were citizens or subjects of the United Kingdom. The Second Circuit did not address materials that were submitted by Chase, which demonstrated the United Kingdom's and the United States Department of State's position that the residents and corporations from the British Overseas Territories were citizens or subjects of the United Kingdom, and should be recognized as such for purposes of alienage jurisdiction. The Second Circuit also did not address its overruling of its 1996 decision in *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 45 n.4 (2d Cir. 1996), which had recognized alienage jurisdiction in a case involving a resident of the British Virgin Islands.

On June 7, 2001, Chase filed with the Second Circuit a petition for rehearing *en banc*. This petition was denied on

July 24, 2001. Chase has duly filed its petition for a writ of certiorari within ninety (90) days of the Second Circuit's denial of the motion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

THE SECOND CIRCUIT'S DECISION, WHICH IS IN DIRECT CONFLICT WITH EVERY OTHER CIRCUIT THAT HAS ADDRESSED THIS ISSUE, VITIATES THE FOUNDING FATHERS' INTENT THAT ALIENS HAVE ACCESS TO FEDERAL COURTS, SUBJECTS THE UNITED STATES GOVERNMENT TO UNFORESEEN INTERNATIONAL ENTANGLEMENTS AND HAS LED TO SUBSTANTIAL UNCERTAINTIES IN THE COMMERCIAL WORLD OVER THE VALIDITY OF STANDARD CONSENT TO JURISDICTION CLAUSES

In 1997, after two centuries of alienage jurisprudence, a divided panel of the Court of Appeals for the Second Circuit in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998), held that residents and corporations from the British Overseas Territories[2] were "stateless", and, thus, not subject to alienage jurisdiction under 28 U.S.C. § 1332(a)(2). Despite a strong dissent by Judge Altimari in the *Matimak* case and expressions of doubt

2. The British Overseas Territories were formerly referred to as the British Dependent Territories. The British Overseas Territories presently include Anguilla, Bermuda, British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, the Pitcairin Islands, Saint Helena and dependencies, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands.

by other Second Circuit judges,[3] the Second Circuit followed the rule in *Matimak* in *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *amended by* 229 F.3d 424 (2d Cir.), *reh'g en banc denied by* 229 F.3d 187 (2d Cir. 2000); and *Universal Reinsurance Co., Ltd. v. St. Paul Fire & Marine Insurance Co.*, 224 F.3d 139 (2d Cir. 2000). The culmination of this line of cases is the Second Circuit's unique ruling in this case that residents and corporations from the British Virgin Islands are also "stateless" and not subject to the alienage jurisdiction provisions of 28 U.S.C. § 1332(a). *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 251 F.3d 334 (2d Cir. 2001).

The Second Circuit's analysis in *Matimak* began with the principle that the term "foreign state" in 28 U.S.C. § 1332(a)(2) refers only to nations formally recognized by the Executive Branch. *Matimak*, 118 F.3d at 79. Since Hong Kong was a British Territory that was not recognized by the Executive Branch as a "foreign state" unto itself, the Second Circuit concluded that alienage jurisdiction could not be invoked by a "citizen or subject" of Hong Kong.[4] *Id.* at 82-

3. *See, e.g.*, *Koehler v. Bank of Bermuda (N.Y.) Ltd.*, 229 F.3d 187 (2d Cir. 2000) (Judges Sotomayor, Leval and Calabresi dissenting); *Koehler v. Bank of Bermuda (N.Y.) Ltd.*, 229 F.3d 424-25 (2d Cir. 2000) (Judges Cardamone and Newman stating that they "would rule that citizens of Bermuda and other British Dependent Territories are sufficiently subject to the sovereignty of the United Kingdom to satisfy the alienage clause of the diversity statute").

4. The *Matimak* case concerned a citizen of Hong Kong, which in 1996 was a British Overseas Territory. In a case brought in 1999, after Hong Kong became an Administrative Region of the People's Republic of China (the "PRC"), the district court held that a Hong Kong citizen could now sue in federal court as a citizen of the PRC. *Favour Mind Ltd. v. Pacific Shores, Inc.*, No. 98 Civ. 7038(SAS), 1999 WL 1115217 at *6-7 (S.D.N.Y. Dec. 7, 1999).

83. The Second Circuit then analyzed whether a corporation or resident of Hong Kong was a "citizen or subject" of the United Kingdom. After first stating that "[w]e begin with the truism that a foreign state is entitled to define who are its citizens and subjects", the *Matimak* court then tried to determine whether the United Kingdom considered residents and corporations from its territories as citizens. *Id.* at 85. Looking at two British statutes, the *Matimak* court concluded that residents and corporations from the United Kingdom's Overseas Territories were not citizens or subjects of the United Kingdom, and, thus, were stateless. *Id.* at 85-86.

Two years later, the Second Circuit, over strong dissent, extended the *Matimak* rule to residents of Bermuda in the *Koehler* and *Universal Reinsurance* cases. In the *Koehler* case, three judges dissented from the denial of rehearing *en banc* and laid out the reasons why this Court should review this issue. Judge Sotomayor, joined by Judges Leval and Calabresi, criticized the *Matimak* opinion, and wrote that "it can only be hoped the Supreme Court chooses to address the resolution of this issue expeditiously." *Koehler*, 229 F.3d at 194. The dissent, referring to *Matimak* as "flawed and internationally troublesome", pointed out that the United Kingdom and the Executive Branch had asked for reconsideration of the reasoning employed in *Matimak*. *Id.* at 187. As the dissent noted, the *Matimak* court's belief that there would be no sovereign to offend had been proved wrong by the United Kingdom's strong reaction, and, thus, the decision frustrated the fundamental purpose of alienage jurisdiction — avoiding offense to foreign nations. *Id.* at 188. The dissent further noted that "[o]ur Circuit is alone in concluding that federal alienage jurisdiction does not extend to citizens and corporations of British Overseas Territories." *Id.* at 189. It then concluded that the *Matimak* court's

interpretation of the United Kingdom's laws had been based on an erroneous reading of those laws, and that the Overseas Territories and their governments exist under the sovereignty of the Crown and are not "stateless" entities. *Id.* at 192 & n.11.

A. The Ruling in the Second Circuit Has Caused a Split in the Circuits and Destroyed the Uniform Application of Alienage Jurisdiction

The Second Circuit's position that residents and corporations from the British Overseas Territories are "stateless" has been rejected by every other Circuit of the Court of Appeals that has addressed this issue. The Third, Fourth, and Seventh Circuits have uniformly held that residents and corporations from these Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of alienage jurisdiction.

In *Southern Cross Overseas Agencies v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 412-13 (3d Cir. 1999), a New Jersey corporation and a Pennsylvania corporation sued a Hong Kong corporation in federal court.[5] The Third Circuit, deferring to the opinion of the State Department, specifically rejected the Second Circuit's holding in *Matimak* and held that the district court had alienage jurisdiction over the dispute. The Third Circuit stated:

> We accord substantial weight to the State Department's position. . . . [I]t considers Hong Kong corporations to have been subjects of the United Kingdom for alienage diversity purposes. This, it

5. Although Hong Kong became an Administrative Region of the People's Republic of China in July 1997, the court noted that Hong Kong was a British Dependent Territory at the time the complaint was filed. *Southern Cross Overseas Agencies, Inc.*, 181 F.3d at 414 n.2.

> represents, best reflects the actual relationship between the United Kingdom, Hong Kong, and the United States. There is no indication that the United Kingdom disagrees. . . . [W]e agree with the State Department that treating Hong Kong corporations as United Kingdom subjects comports with the facts and the law of alienage jurisdiction.

Id. at 418.

Similarly, in *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-43 (7th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991), the Seventh Circuit held that alienage jurisdiction existed over a suit brought by residents of Illinois against a Cayman Islands corporation. The Seventh Circuit found "no reason to depart from the weight of authority." *Id.* at 1243. The Court reasoned:

> Certainly, the exercise of American judicial authority over the citizens of a British Dependent Territory implicates this country's relationship with the United Kingdom — precisely the raison d'etre for applying alienage jurisdiction. Not applying alienage jurisdiction in this case would allow "form rather than substance" to govern.

Id. (citation omitted).

Likewise, in *Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998), a suit brought by a Maryland resident against a Bermuda resident for misrepresentation, the Fourth Circuit held that diversity jurisdiction existed because the Bermuda resident was a "citizen or subject" of the United Kingdom.

Given the conflict between the Second Circuit and the decisions of the Third, Fourth and Seventh Circuits on an issue involving federal court subject matter jurisdiction, Petitioner respectfully submits that the Supreme Court should grant the petition for a writ of certiorari in order to ensure uniformity among the federal courts and so ensure the fundamental legal principle that the reach of the federal courts' jurisdiction is the same nationwide. Such uniformity is most important to the capital markets which routinely utilize indentures and other similar documents that include jurisdictional clauses virtually identical to the one in this case.

B. The Second Circuit's Opinion is Contrary to the Founding Fathers' Intent to Ensure Aliens Access to the Federal Courts

The Supreme Court should also review the Second Circuit's decision because it vitiates the very reasons the Founding Fathers included alienage jurisdiction in the Constitution. After the Revolutionary War and prior to the adoption of the Constitution, the state courts, fueled by a mixture of anti-British and anticreditor sentiment, made it difficult for British creditors to collect debts from local debtors. *See* Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 6 (1996). Alienage jurisdiction was seen as a means of addressing this problem by providing foreign litigants with a neutral federal forum. *See id.* The writings of the Founding Fathers indicate that two predominant reasons were advanced as the basis for alienage jurisdiction.

The first of these reasons was to prevent entanglements with foreign governments that became upset when their citizens were unfairly treated by a less-than-neutral state court. Alexander Hamilton set forth this concern in *The Federalist No. 80*:

> [T]he peace of the WHOLE ought not be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquility. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical

> discrimination between the cases of one complexion and those of the other. So great a proportion of the cases in which foreigners are parties involve national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

The Federalist No. 80, at 476-77 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This foreign relations aspect of alienage jurisdiction is set forth not only in *The Federalist*, but also in the writings of many of the other Founding Fathers.

> [T]here is a particular & very cogent reason for securing to foreigners a trial . . . in a federal court. With respect to foreigners, all of the states form but one nation. This nation is responsible for the conduct of all its members towards foreign nations, their citizens & subjects; and therefore ought to possess the power of doing justice to the latter. Without this power, a single state, or one of its citizens, might embroil the whole union in a foreign war.

Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), in 14 *The Documentary History of the Ratification of the Constitution* 204 (1983).[6]

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6. *See also* 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 158-59 (Jonathan Elliot ed., 1888) (Comments of William Davie of North Carolina); 3 *id.* at 533-34 (Comments of James Madison of Virginia); 2 *id.* at 492-93 (Comments of James Wilson of Pennsylvania).

The second of the major purposes behind alienage jurisdiction was to promote foreign investment in and trade with the fledgling republic. The Founding Fathers recognized that the ill treatment of foreigners by the state courts could discourage foreign investment. James Madison, in particular, noted this aspect of the need for alienage jurisdiction: "We well know, sir, that foreigners cannot get justice done them in [state] courts, and this has prevented many wealthy gentleman from trading or residing among us." 3 Eliot, *supra*, at 583.

As set forth hereafter, the *Matimak* holding that the residents and corporations of the British Overseas Territories are "stateless" and unable to participate in any federal forum under the alienage jurisdiction provisions completely undercuts the express intent of the Founding Fathers to prevent foreign entanglements and to promote trade.

C. The *Matimak* Decision Has Led to a Foreign Entanglement with the United Kingdom

The Second Circuit's opinions have created an entanglement with one of the United States' greatest allies, the United Kingdom. After *Matimak*, the United Kingdom specifically issued a Diplomatic Note that expressed its "concern about a number of judicial decisions which have denied corporations of United Kingdom Overseas Territories access to United States Federal Courts." *See* Diplomatic Note No. 13/2000 from the British Embassy in Washington, D.C. to the United States State Department, Feb. 2, 2000 at 1.[7] The Diplomatic Note further states:

7. The Diplomatic Note was attached as an exhibit to the United Kingdom's amicus curiae brief submitted to the United States Court (Cont'd)

> The United Kingdom also views with great concern the potential application of the Matimak rationale to individual Overseas Territories residents, as well as to commercial enterprises.
>
> The United Kingdom notes that all corporations validly incorporated under the laws of the United States and its territories are entitled to sue and be sued in the courts of the United Kingdom and its Overseas Territories. As a matter of international comity and reciprocity, the United Kingdom considers that United States Federal Courts should be open to corporations established in United Kingdom Overseas Territories.

See id. The United Kingdom has also been vigorous in submitting briefs to various courts that have addressed this issue, asserting that the residents and corporations of its Overseas Territories are its "citizens or subjects".[8] The United

(Cont'd)
of Appeals for the Fifth Circuit in the matter captioned *ART 57 Properties, Inc. v. 57 BB Property, L.L.C.*, No. 99-10385 (5th Cir.) (affirmance reported at 212 F.3d 596 (5th Cir. 2000)). The United States Department of State also submitted an amicus curiae brief in this matter. Both of these briefs, including the attached Diplomatic Note, were appended to Chase's Supplemental Brief that was submitted to the Court of Appeals on December 18, 2000. Hereinafter, the United Kingdom's and the State Department's briefs in the *ART 57 Properties, Inc.* matter will be referred to as the "UK ART 57 Brief" and the "US ART 57 Brief," respectively.

8. Besides its most recent submission to the Fifth Circuit in the *ART 57 Properties, Inc.* case, the United Kingdom has also submitted an amicus curiae brief in support of a petition for a writ of certiorari (Cont'd)

States Department of State has also made multiple submissions to various courts, urging that the residents of the British Overseas Territories be treated as citizens or subjects of the United Kingdom.[9] Such submissions by both the governments of the United Kingdom and the United States indicate that the Second Circuit's conclusion in *Matimak* that declaring the residents of the British Overseas Territories "stateless" would not have any foreign policy repercussions was clearly in error.

D. The *Matimak* Line of Decisions Will Have an Adverse Economic Impact

It is also obvious that rather than promote economic investment in the United States, the Second Circuit's line of decisions adversely affects it. There is no doubt that the *Matimak* line of cases deprives a considerable number of foreign entities and individuals an opportunity to have their claims heard in federal courts within the Second Circuit. Even today, foreign entities and individuals still are leery, as the Founding Fathers pointed out, of possible partiality on the

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to the Supreme Court in *Matimak* and an amicus curiae brief in support of the plaintiff's opposition to a motion to dismiss in the matter captioned *III Finance Ltd. v. Aegis Consumer Funding Group, Inc.*, No. 99 Civ. 2579 (DC) (S.D.N.Y.) [decision reported at 1999 WL 1080371 (S.D.N.Y. Nov. 30, 1999)].

9. The United States submitted an amicus curiae brief to the Second Circuit in the *Matimak* matter (*see Matimak*, 118 F.3d at 86 (noting Department of Justice's position)), to the Fifth Circuit in the *ART 57 Properties, Inc.* matter and to the Third Circuit in the *Southern Cross Overseas Agencies, Inc.* matter (*see* 181 F.3d at 417 (noting the State Department's brief)).

part of the state courts. *See* Johnson, *supra*, at 33 ("Many foreign corporations and business associations have fears similar to those of their British predecessors."). The Diplomatic Note from the United Kingdom explicitly notes the adverse economic impact:

> The United Kingdom wishes to make clear its position that corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom. The United Kingdom is therefore of the view that such corporations ought to be amenable to the alienage jurisdiction of the United States Federal Courts under section 1332 (a) (2) of title 28 of the United States Code, whether as plaintiffs or defendants. Court decisions which fail to recognise such jurisdiction may have a serious detrimental effect on the trading relationship between the United States and the United Kingdom Overseas Territories.

Diplomatic Note, *supra*.

The British Overseas Territories are becoming large economic and financial centers,[10] yet due to the law now

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10. In the UK ART 57 Brief the United Kingdom stated that:

> By recent estimates, there were over 350,000 international business companies incorporated in the British Virgin Islands. There were 563 banks, 377 insurance companies, and 33,792 business companies incorporated in the Cayman Islands. In Bermuda there were 1,400 insurance companies and 6,824 business

(Cont'd)

settled in the Second Circuit, such companies may be less willing to do business in the United States. This is especially problematic when one considers that many commercial contracts and financial instruments, like the Indenture in this case, call for a forum in New York, traditionally the financial center of the United States. Petitioner is trustee under numerous sophisticated debt indentures collectively concerning billions of dollars, which contain consent to jurisdiction clauses similar to the one at issue here, signed by aliens as part of major debt offerings issued in this country. The negative impact on these types of financings from a decision which injects substantial uncertainty, and disparity between Circuits, into a previously-settled area of the law as critical as that of subject matter jurisdiction cannot be overstated.

E. *Matimak*'s Novel Interpretation of 1332(a)(2) is Based on an Incorrect Reading of U.K. Law

Matimak and the cases applying it, including this one, were incorrectly decided. At the core of the *Matimak* analysis was "the truism that a foreign state is entitled to define who are its citizens or subjects." *Matimak*, 118 F.3d at 85. In trying to determine if the United Kingdom deemed the residents of its territories as "citizens or subjects" under 1332(a)(2), the Court looked to both the British Nationality Act 1981 and the British Companies Act 1948. *Id.* at 85-86. The *Matimak* court concluded that under the law of the United Kingdom,

(Cont'd)

> companies incorporated. In the Turks and Caicos Islands, 1911 insurance companies and 11,000 business companies were incorporated.

UK ART 57 Brief, at 20.

corporations from the Overseas Territories were not citizens or subjects of the United Kingdom, and thus were "stateless". *Id.* at 86. The United Kingdom strongly disagrees.

The United Kingdom has clearly pointed out in subsequent amicus briefs that it is internationally responsible for the residents and corporations from its overseas territories and that such residents and corporations are subject to United Kingdom sovereignty. As the United Kingdom has explained, while "Great Britain" is the collective term for England and Wales, and Scotland, the "United Kingdom," as a State and subject of international law, includes Northern Ireland, the United Kingdom Overseas Territories and the Crown Dependencies. *See* UK ART 57 Brief, at 5. Like England and Wales, Scotland, and Northern Ireland, each Overseas Territory and Crown Dependency is a separate law district, entitled to enact its own laws in accordance with its constitution. *See* UK ART 57 Brief, at 6. Although each law district has separate laws, they all belong to one state, the United Kingdom, and are subject to United Kingdom sovereignty.

For example, under the United Kingdom Government's Diplomatic Service Procedure Manual, Vol. 7, Annex 1 (Mar. 1996), the term "United Kingdom National" is defined to include "British Dependent Territories Citizens" and "[c]ompanies incorporated under the law of the United Kingdom or of any territory for which the United Kingdom is internationally responsible." *See* UK ART 57 Brief, at Exhibit 2, Rule 1(b).

The fact that the United Kingdom considers the residents and corporations from its territories as its "nationals" should be no surprise when one considers, as an example, the

relationship between the British Virgin Islands and United Kingdom. The Governor of the British Virgin Islands, who is appointed by the Queen, is responsible for core government functions including internal security, public service and court administration. *See* UK ART 57 Brief, at 14. Similarly, any bill passed by the Legislative Council of the British Virgin Islands must be approved by the Governor and the Queen, with such procedure including a careful review by the United Kingdom's Foreign and Commonwealth Office. *Id.* at 14-15. Further, the United Kingdom not only negotiates international treaties on behalf of the British Virgin Islands, but also executes them on behalf of the British Virgin Islands. *See, e.g.*, United Kingdom of Great Britain and Northern Ireland (on Behalf of the British Virgin Islands) and the United States of America: Exchange of Letter Constituting a Narcotics Cooperation Agreement with Respect to the British Virgin Islands, 1681 U.N.T.S. 28491 (April 14, 1987).

The British Virgin Islands has stated that its citizens and corporations are subject to the sovereignty of the United Kingdom. The Attorney General for the British Virgin Islands, Cherno S. Jallow, issued a statement dated February 3, 2000, that fully supports the conclusion that residents and corporations of the British Virgin Islands are subjects of the United Kingdom. *See* UK ART 57 Brief, at Exhibit 3 ("On behalf of the Government of the British Virgin Islands, I fully support the arguments and conclusions presented in the [*ART 57 Properties*] Brief of the United Kingdom."). In this instance, where the three relevant governments (the United Kingdom, the British Virgin Islands and the United States) all have opined that the residents of the British Virgin Islands are subjects of the United Kingdom, there can be no reasoned argument which would allow a court to reach a different conclusion. *See Favour Mind Ltd.*, 1999 WL 1115217 at *6-

7 & n.12 (holding that corporations from post-reversion Hong Kong were subjects of the PRC based on the uniform positions of the PRC, Hong Kong SAR and the United States); *see also Southern Cross Overseas Agencies*, 181 F.3d at 418 ("We accord substantial weight to the State Department's position").

An historical analysis of the development of the alienage jurisdiction provision reveals that there is no basis for the Second Circuit's narrow reading of that provision in *Matimak*. "[T]he drafters of the Constitution chose the words 'citizens' or 'subjects' to refer to the broad category of those under the authority of a foreign power." *Koehler*, 229 F.3d at 191 (Sotomayor, J., dissenting) (citing *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87, 3 L. Ed. 38 (1809) (Marshall, C.J.)). Section 11 of the Judiciary Act of 1789 provided for jurisdiction in cases in which "an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Apparently the framers and drafters of this first Judiciary Act used the terms foreigners and aliens interchangeably when referring to non-United States citizens or subjects. *Koehler*, 229 F.3d at 191 (citing *Southern Cross Overseas Agencies, Inc.*, 181 F.3d at 416).

In 1875, the alienage jurisdiction provisions were amended such that the term "alien" was replaced by the current "citizens or subjects" language. This change, however, was not made in order to narrow the meaning of "alien", but rather was intended to have the statute mirror the Constitution in order to make it clear that the federal courts did not have jurisdiction over disputes between aliens. *See* Johnson, *supra*, at 21.

Thus, the understanding of the terms "alien" and "citizens or subjects" as simply an indication that someone is under the sovereignty of another nation should continue today. In fact, prior to 1997 the Second Circuit, itself, had maintained this understanding and had never found that a resident or corporation from a recognized nation's territories was "stateless". The Second Circuit, in *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 45 n.4 (2d Cir. 1996), actually held that there was jurisdiction in an action between a New York corporation and a British Virgin Islands corporation. The sudden change, just a year later, was not precipitated by a change in the Judiciary Act or the legal status of British Dependent Territory residents by the United Kingdom. Instead, this change was simply a change in interpretation — an interpretation with which all other circuits deciding this issue have disagreed.

F. The Problems Engendered by the *Matimak* Line of Decisions Will Not Be Ended until This Court Resolves This Issue

The significance of this issue continues to grow. Since *Matimak* at least nine cases in the Second Circuit have been dismissed where one of the parties was a resident or entity from the British Overseas Territories.[11] If any of these cases

11. *See, e.g.*, *Koehler*, 209 F.3d at 139 (dismissing action against Bermuda defendants); *Universal Reinsurance Co., Ltd.*, 224 F.3d at 141 (holding there would be no alienage jurisdiction for a domiciliary of Bermuda); *General Star Indem. Co. v. Platinum Indem. Ltd. Bank of Am.*, No. 00 Civ. 4960(LMM), 2001 WL 40763 at *1-2 (S.D.N.Y. Jan 17, 2001) (holding that there was no subject matter jurisdiction because the defendant is a Bermuda corporation.); *New Heaven Properties Ltd. v. Grinberg*, No. 99 Civ. 11546(LMM), 2001 WL (Cont'd)

were commenced in the Third, Fourth or Seventh Circuits, the cases would not have been dismissed because the British Overseas Territories are not viewed as "stateless" jurisdictions in those circuits. In addition, one district court in the Second Circuit has gone so far as to recognize that the argument may be extended to other nations' dependencies.[12] With each dismissal, the Constitutional purpose for alienage jurisdiction is thwarted. The United Kingdom can only become more and more concerned as its citizens and the residents of its Overseas Territories are denied access to federal court, and the Executive Branch can only be more and more embarrassed that the courts in the financial center of the country have taken a position, in direct contrast to the Constitution and the rest of the country, that deems the residents of the territories of one of our greatest allies as

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64842 at *1-3 (S.D.N.Y. Jan. 26, 2000) (dismissing a British Virgin Islands corporation's complaint); *III Fin. Ltd. v. Aegis Consumer Funding Group, Inc.*, No. 99 Civ. 2579(DC), 1999 WL 1080371 at *3-4 (S.D.N.Y. Nov. 30, 1999) (granting defendant's motion to dismiss because the plaintiff was a Cayman Islands corporation); *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 Civ. 6124(JGK), 1999 WL 307666 at *3-4 (S.D.N.Y. May 17, 1999) (dismissing action against a Cayman Islands defendant), *aff'd*, 199 F.3d 94 (2d Cir. 1999); *Lucky Yeh Int'l, Ltd. v. Happiness Express, Inc.*, No. 96 Civ. 3365(SJ), 1999 WL 147095 at *3 (E.D.N.Y. March 12, 1999) (dismissing Hong Kong corporation's complaint); *Klein v. Marriott Int'l., Inc.*, 34 F. Supp. 2d 176, 178-80 (S.D.N.Y. 1999) (dismissing complaint against Bermuda defendant).

12. *See, e.g.*, *Inarco Int'l. Bank N.V. v. Lazard Freres & Co.*, No. 97 Civ. 0378(DAB), 1998 WL 427618 at *1-2 (S.D.N.Y. July 29, 1998) (recognizing that defendant sought to dismiss Aruban bank's complaint because Aruba was a Dutch dependency, but then dismissing complaint on another jurisdictional basis).

"stateless." Absent the Supreme Court's decision to address this issue in this case, there will continue to be a fundamental split between the Second Circuit on one hand, and the Constitution, the Founding Fathers and the other Circuits on the other hand. As stated in Judge Sotomayor's dissent in *Koehler*, 229 F.3d at 193-94, in which the Second Circuit denied a motion for rehearing *en banc*:

> Because these panel decisions have caused a clear split in authority with the other circuit courts, and in light of the potential damage to relations between the United States and the United Kingdom and other nations, it can only be hoped that the Supreme Court chooses to address the resolution of this issue expeditiously.

CONCLUSION

For all the reasons set forth herein, the petition for a writ of certiorari should be granted, the decision of the United States Court of Appeals for the Second Circuit should be reversed, and the matter remanded to the Second Circuit for a decision on the merits of Traffic Stream's appeal.

Dated: October 18, 2001

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED MAY 24, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2001

(Originally submitted: December 1, 2000
Final submission: December 18, 2000
Decided: May 24, 2001)

Docket No. 00-7721

THE CHASE MANHATTAN BANK, as Indenture Trustee, under the Indenture, dated as of May 6, 1998,

Plaintiff-Appellee,

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Defendant-Appellant.

Before: McLAUGHLIN and SACK, *Circuit Judges*, and CHATIGNY, *District Judge*.*

* * *

* The Honorable Robert N. Chatigny, of the United States District Court for the District of Connecticut, sitting by designation.

Appendix A

PER CURIAM:

BACKGROUND

Traffic Stream (BVI) Infrastructure Limited ("Traffic Stream"), incorporated in the British Virgin Islands, is the parent of four wholly owned Hong Kong subsidiaries. Through these subsidiaries, Traffic Stream owns interests in thirteen Chinese-foreign cooperative joint ventures. Each joint venture is a partnership between one of the Hong Kong subsidiaries and a Chinese partner. The joint ventures are all engaged in the development, construction, and operation of six toll-road projects in China.

The contracts governing the joint ventures guarantee the Hong Kong subsidiaries a fixed annual return on their investments in the toll-road projects. If the operating income generated by a joint venture is less than the fixed annual rate of return, the Chinese partner is obligated to pay the difference to the Hong Kong subsidiary from its own funds. According to Traffic Stream, its income derives "solely and ultimately" from the joint ventures.

In order to finance these joint ventures, Traffic Stream entered into an Indenture with The Chase Manhattan Bank ("Chase"), a New York Corporation, on May 6, 1998. Pursuant to the Indenture, Traffic Stream issued 14 1/4 percent Notes in an aggregate amount of $199,000,000 which are due in 2006. The Indenture requires Traffic Stream to make semi-annual interest payments on the Notes in May and November of each year, commencing in November 1998. Additionally, Traffic Stream executed a Letter of Credit

Appendix A

Procurement and Deposit Agreement according to which it promised to deliver a letter of credit in the amount of $8,058,750 to Chase by January 6, 1999, and to replace the letter of credit by depositing $8,058,750 into a Construction Funding Account on or before May 6, 1999.

The Indenture provided that it was to "be governed by and construed in accordance with" New York law. Traffic Stream agreed by its terms to submit "to the jurisdiction of any court of the State of New York or any United States federal court sitting in the Borough of Manhattan, New York City, New York, United States, and any appellate court from any thereof."

Traffic Stream made its first required interest payment on November 1, 1998. It is undisputed that Traffic Stream thereafter committed multiple defaults.

In response to these defaults, on June 4, 1999, Chase began this action in the United States District Court for the Southern District of New York on the basis of "alienage jurisdiction" grounded on the status of the plaintiff as a New York corporation and the defendant as a British Virgin Islands corporation. *See* § 1332(a). The complaint set forth five claims, all under New York law: (1) breach of contract; (2) replevin of collateral; (3) specific enforcement of defendant's reporting obligations; (4) an accounting; and (5) recovery of costs for collection.

Traffic Stream concedes that, at least technically, it has committed defaults under the Indenture. It asserts, however, that these defaults, which underlie the breach of contract and

replevin claims, are excused by the legal defense of impossibility. Ch e responds, *inter alia*, that the impossibility defense is for various reasons unavailable to Traffic Stream.

On January 31, 2000, the district court (Shira A. Scheindlin, *Judge*) granted Chase's motion for summary judgment. *See Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 86 F. Supp. 2d 244 (S.D.N.Y. 2000). The court concluded that § 501 of the Indenture barred Traffic Stream's impossibility defense. *Id.* at 256-59. It further held that even if § 501 did not bar the defense, Traffic Stream did not meet the "objectively impossible" element of that defense and that New York does not recognize a defense based on financial impossibility. *Id.* at 259-61. A deficiency judgment in favor of Chase in the amount of $98,388,352.74 was therefore entered on May 9, 2000.

Traffic Stream appeals.

DISCUSSION

"It is axiomatic that federal courts are courts of limited jurisdiction and may not decide cases over which they lack subject matter jurisdiction." *Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000). "[F]ailure of subject matter jurisdiction is not waivable and may be raised at any time by a party or by the court *sua sponte*. If subject matter jurisdiction is lacking, the action must be dismissed." *Id.* at 700-01 (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *United Food & Commercial Workers Union, Local 919 v. CenterMark Props. Meriden Square, Inc.*, 30 F.3d 298, 301 (2d Cir. 1994)).

Chase's claims against Traffic Stream arise under state law. The federal courts have subject matter jurisdiction over such claims if, *inter alia*, the parties are "(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; [or] (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties." 28 U.S.C. § 1332(a). The district court in the case at bar proceeded under § 1332(a)(2) on the apparent, unchallenged assumption that Traffic Stream is a "citizen[ ] or subject[ ] of a foreign state" — the United Kingdom or the British Virgin Islands.

In *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998), we held that a plaintiff corporation organized under the laws of Hong Kong did not qualify as a "citizen[ ] or subject[ ] of a foreign state" under § 1332(a)(2). At the time of the suit, Hong Kong was a British Dependent Territory. We concluded that "the United States does not regard Hong Kong as an independent, sovereign political entity," and the plaintiff was therefore not a "citizen[ ] or subject[ ] of a foreign state" by virtue of its incorporation in Hong Kong. *Id.* at 82. Under British law, we further held, the plaintiff was not a citizen or subject of the United Kingdom. *Id.* at 85, 86. We therefore decided that the plaintiff Hong Kong corporation was technically "stateless" and that "a stateless person — the proverbial man without a country — cannot sue a United States citizen under alienage jurisdiction." *Id.* at 86.

Similarly, in *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130, *rehearing in banc denied*, 229 F.3d 187 (2d Cir. 2000), the defendants were Bermuda corporations

and an individual with Bermuda citizenship. Bermuda at the time of suit, like Hong Kong at the time of *Matimak*, was a British Dependent Territory. We therefore concluded that "*Matimak* governs the jurisdictional issue in this case" and that "[t]he district court therefore lacked subject matter jurisdiction over the state law claims against the Bermuda defendants." *Id.* at 139. *See also Universal Reinsurance Co. v. St. Paul Fire and Marine Ins. Co.*, 224 F.3d 139, 140-41 (2d Cir. 2000) (Bermuda corporation could not bring suit in federal court on the basis of alienage jurisdiction) (citing *Koehler* and *Matimak*).

Because Traffic Stream is a British Virgin Islands corporation and the parties had not briefed the issue of alienage jurisdiction on appeal, we requested at oral argument that the parties submit supplemental briefs addressing whether the district court had subject matter jurisdiction over this case in light of the *Matimak* line of cases. Each party submitted such a brief.

The British Virgin Islands is a British Dependent Territory, as Hong Kong was at the time of *Matimak* and Bermuda was at the time of *Koehler* and *Universal Reinsurance*. (It is, to be precise, a United Kingdom or British "Overseas Territory," but that is simply a new name for "British Dependent Territory."[1]) Nothing relevant to the

1. In February 1998, the United Kingdom Government announced that all "Dependent Territories" would in the future be known as "Overseas Territories." There is no practical difference between the term "Overseas Territory" used here in reference to the British Virgin

(Cont'd)

alienage jurisdiction inquiry has changed since we decided those appeals.[2] We are bound to hold that Traffic Stream is not a citizen or subject of a foreign state and that the district court therefore had no alienage jurisdiction over this action under § 1332(a)(2). No other basis for jurisdiction has been asserted by either party. Federal jurisdiction being absent, the action must be dismissed.

CONCLUSION

Traffic Stream is not a "citizen[ ] or subject[ ] of a foreign state" under 28 U.S.C. § 1332(a)(2), and there is no other basis for federal jurisdiction over this lawsuit. Accordingly, we reverse the judgment of the district court and remand with instructions for the district court to dismiss the complaint without prejudice.

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Islands and the term "Dependent Territory." Nor is there any practical difference between these terms and the terms "dependency," "colony," or "crown colony."

Brief *amicus curiae* for the United Kingdom, 1 n.2, *ART 57 Prop., Inc. v. 57 BB Prop., L.L.C., et al.* No. 99-10385 (5th Cir. 2000) (reported at 212 F.3d 596 (table)).

2. The source material supplied to us by Chase in support of its supplemental brief on the issue of alienage jurisdiction was apparently available to and considered by Judge Sotomayor in writing the opinion in dissent from denial of rehearing in banc in *Koehler*. *See Koehler*, 229 F.3d 187, 188 n.3 (2d Cir. 2000) (Sotomayor, J., with whom Leval and Calabresi, JJ., joined, dissenting from denial of rehearing in banc).

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 8, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 4056 (SAS)

THE CHASE MANHATTAN BANK, AS INDENTURE TRUSTEE, UNDER THE INDENTURE, DATED AS OF MAY 6, 1998,

Plaintiff,

– against –

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Defendant.

MEMORANDUM OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

In an Opinion and Order dated February 2, 2000, I granted summary judgment in plaintiff's favor and ordered plaintiff to foreclose on certain Collateral Accounts and to submit a request for a deficiency judgment. *See The Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Limited*, 86 F. Supp. 2d 244, 248, 266 (S.D.N.Y. 2000).[1]

1. Familiarity with the underlying facts resulting in the judgment is assumed.

Plaintiff has done so by submitting an Affidavit of Francis J. Grippo, Vice President of The Chase Manhattan Bank, in Support of Request for Deficiency Judgment, dated February 18, 2000 ("Grippo Aff."). Defendant does not dispute the re-calculated principal amount owed as of March 24, 1999 ($126,040,006.94), *id.* ¶ 2, or the total amount foreclosed on the Collateral Accounts ($49,054,290.84), *id.* ¶ 4. Defendant does dispute plaintiff's calculation of interest from March 24, 1999 through the present and the treatment of other collateral consisting of shares of four of defendant's wholly-owned Hong Kong subsidiaries. *See* Defendant's Objection to Request for Deficiency Judgment ("Obj.") ¶¶ 14-16 and Exhibit C (letter from Thomas Foley, Vice President of The Chase Manhattan Bank, to defendant, dated July 15, 1999, regarding Mortgage of Shares).

In his Affidavit, Mr. Grippo explains that the total debt under the Indenture Agreement was accelerated on March 24, 1999, at which point the new principal amount became $126,040,006.94, consisting of $119,000,000 in original principal and $7,040,006.94 in accrued interest. Grippo Aff. ¶ 2. The $7,040,006.94 accrued interest was calculated as follows. *First*, interest for the period November 1, 1998 through January 2, 1999 was calculated at 14.75% which represents the 14.25% stated interest rate plus 0.50% in additional Special Interest resulting from defendant's failure to have its Registration Statement declared effective on or prior to the 150th day following the date of the Indenture. *Id.* ¶ 2 n.1; *see also* Indenture, attached as Exhibit A to the Grippo Aff., at A-5. *Second*, interest for the period January 2, 1999 through March 24, 1999, the date of acceleration, was calculated at 15.00%, representing the 14.75% interest

rate previously used plus 0.25% in additional Special Interest resulting from defendant's continued failure to have its Registration Statement declared effective.[2] Grippo Aff. ¶ 2 n.2; *see also* Indenture at A-5. This second rate was used through April 2, 1999, corresponding to the end of the first ninety-day period. Then, for the period April 2, 1999 through December 30, 1999, 15.25% was used, representing an additional 0.25% increase for defendant's failure to have its Registration Statement declared effective during the second ninety-day period.[3] Grippo Aff. ¶ 2 n.3; *see also* Indenture at A-5. Finally, from December 31, 1999 through February 19, 2000, a rate of 17.25% was used, consisting of the 15.25% rate previously calculated plus an additional 2% in Penalty Interest resulting from defendant's failure to maintain a Debt Service Coverage Ratio of 1.75 to 1. Grippo Aff. ¶ 2 n.4; *see* also Indenture at A-6.

Defendant objects to the use of the 15.25% and 17.25% rates on the ground that as of the default and acceleration date, March 24, 1999, defendant was no longer required to maintain an effective Registration Statement or the stated Debt Service Coverage Ratio. *See* Obj. ¶¶ 7-8. Defendant contends that interest should continue to accrue at 15.00% because, here, the non-breaching party elected to treat the

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2. Additional Special Interest at a rate of 0.25% accrues for each consecutive ninety-day period that defendant continues to fail to have its Registration Statement declared effective, not to exceed a total of 1.00%. *See* Indenture at A-5.

3. This 15.25% rate was used beyond the second ninety-day period because the aggregate 1.00% limit on Special Interest had been reached (0.50% + 0.25% + 0.25%). *See* Indenture at A-5.

contract as terminated and sue for damages. *See id.* ¶ 10. According to defendant, the 1% step-up for failure to maintain an effective Registration Statement and the 2% penalty for failure to meet the Debt Service Coverage Ratio was

> designed to compensate the bondholder for their (i) inability to freely sell the bonds in the public markets, in the case of the failure to maintain an effective registration statement, and (ii) increased exposure over time due to the decline in the defendant's financial condition, in the case of the failure to meet the Debt Service Coverage Ratio. But here, as of March 24, 1999 the bondholder's inability to sell the bonds in the public markets was due to the default and acceleration, not the failure to maintain an effective registration statement, and their exposure was fixed no later than March 24, 1999. On that date the defendant became liable for all unpaid principle [sic] and interest at the then applicable interest rate.

Obj. ¶ 11.

Plaintiff supports its use of the higher interest rates by citing to two sections of the Indenture Agreement. *First*, plaintiff cites Section 510 which states, in relevant part, that

> no right or remedy herein conferred upon or reserved to the Trustee or to the Holders is intended to be exclusive of any other right or remedy, and every right and remedy shall, to the

> extent permitted by law, be cumulative and in addition to every other right or remedy given hereunder . . . .

Indenture at 53. *See* Plaintiff's Response to Defendant's Objection to Plaintiff's Request for Deficiency Judgment ("Resp.") ¶ 4. Unlike plaintiff, however, I interpret the rights or remedies "herein conferred" to mean those conferred by Article Five of the Indenture Agreement which is entitled "REMEDIES." I do not construe Section 510 to cover the various interest rate triggers described on pages A-5 and A-6 of the Indenture Agreement. Accordingly, Section 510 does not support plaintiff's use of the increased rates.

Second, plaintiff cites Section 309 of the Indenture Agreement. Resp. ¶ 5. Section 309 provides that Defaulted Interest includes "Additional Interest" which is defined in Section 101 as including Special Interest and/or Penalty Interest. *See* Indenture at 41, 2. This citation fails to support plaintiff's argument for the higher interest calculation given that the 15.00% rate does, in fact, include 0.75% in Special Interest.

In short, defendant's obligation to plaintiff became fixed on March 24, 1999, the date of acceleration, as did the rate of interest to be applied to any unpaid amounts. As of that date, the Indenture Agreement, in effect, no longer governed the obligations of the parties except for the payment of amounts then owing. Accordingly, the interest rate increases triggered by defendant's failure to comply with certain provisions of the Indenture Agreement were no longer applicable.

In light of the above, the amount of interest, using a 15.00% interest rate, for the period March 24, 1999 through March 24, 2000 is $18,906,001.41 ($126,040,006.94 * .15 * 1). The accrued interest for the period March 24, 2000 through May 9, 2000 is $2,382,674.10 ($126,040,006.94 * .15 * 46/365). The total amount of accrued interest from March 24, 1999 to the day of judgment is $21,288,675.51.

Thus far, the deficiency judgment shall include $126,040,006.94 in outstanding principal and $21,288,675.51 in accrued interest. To this amount is added $103,590.06 in attorneys' fees and $10,371.07 in disbursements.[4] Defendant did not object to these amounts which appear fair and reasonable. This results in a total amount due of $147,442,643.58. An offset against this amount for the foreclosed Collateral Accounts in the amount of $49,054,290.84 results in a net deficiency judgment of $98,388,352.74.

Against this amount, defendant seeks an offset for the value of certain additional collateral, namely pledged shares of four Hong Kong companies owned by defendant and/or its shareholders. Plaintiff states, however, that the Trustee never obtained control of these companies, nor has there been any valuation of the companies. *See* Resp. ¶ 7. Until these two conditions have been satisfied, specifically transfer of ownership and an adequate, independent valuation, the value of these companies will not affect the amount of the deficiency judgment entered herein. If and when these

4. *See* Affidavit of Sarah L. Reid, plaintiff's attorney, in Support of Request for Attorneys [sic] Fees, dated February 18, 2000 ¶ 2 and Exhibits A (attorney time entries) and B (disbursements posted).

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conditions are satisfied, the value of the additional collateral will be applied against the deficiency judgment.

The Judgment Clerk is hereby ordered to prepare a deficiency judgment in accordance with this Opinion.

SO ORDERED:

s/ Shira A. Scheindlin
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
May 8, 2000

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 31, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 4056 (SAS)

THE CHASE MANHATTAN BANK, AS INDENTURE TRUSTEE, UNDER THE INDENTURE, DATED AS OF MAY 6, 1998,

Plaintiff,

– against –

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Defendant.

OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

This is a diversity contract action arising out of a high-yield debt instrument. On May 6, 1998, plaintiff Chase Manhattan Bank ("Chase"), acting as Trustee, and defendant Traffic Stream (BVI) Infrastructure Limited ("Traffic Stream") entered into an Indenture Agreement (the "Indenture") pursuant to which defendant issued 14 1/4 percent Senior Secured Notes (the "Notes") in an aggregate

amount of $119,000,000 to various holders. Traffic Stream issued the Notes to finance a business venture involving the construction of toll roads in the People's Republic of China ("China").

On June 4, 1999, plaintiff commenced this litigation contending that Traffic Stream defaulted on its obligations under the Indenture. Plaintiff seeks, among other things, immediate repayment of defendant's indebtedness including both principal and interest. Plaintiff now moves for summary judgment pursuant to Federal Rule of Civil Procedure 56.

In its opposition to plaintiff's motion, defendant admits that it defaulted on its obligations under the Indenture. However, defendant argues that its defaults should be excused pursuant to the contract doctrine of "impossibility of performance." Specifically, defendant contends that a change in Chinese policy delayed defendant's recoupment of monies from the toll-road projects, making it "impossible" for defendant to fulfill its payment obligations under the Indenture.

There is no dispute that defendant defaulted on its obligations under the Indenture. Accordingly, the sole issue with respect to summary judgment is whether defendant can, as a matter of law, plausibly maintain an impossibility defense. Because I find that defendant cannot maintain such a defense, and for the reasons set forth below, plaintiff's motion is granted in its entirety.

I. Jurisdiction

The Court has diversity jurisdiction over this dispute pursuant to 28 U.S.C. § 1332 because plaintiff is a corporate citizen of New York, defendant is a corporate citizen of the British Virgin Islands and the matter in controversy exceeds $75,000. Complaint ¶¶ 1-3; Amended Answer ¶¶ 1,3. Moreover, pursuant to section 112 of the Indenture, Traffic Stream explicitly consents to the personal jurisdiction of this Court over "any, suit, action or proceeding . . . brought in connection with th[e] Indenture or the Notes." Indenture, Ex. A to 10/6/99 Affidavit of plaintiff's counsel Sarah Reid ("Reid Aff."), § 112(a).[1]

II. Background

The following facts are taken from the parties' Rule 56.1 statements and supporting affidavits. Unless otherwise indicated, the facts are undisputed.

A. Traffic Stream

Traffic Stream is a corporation organized under the laws of the British Virgin Islands. Plaintiff's Rule 56.1 Statement of Undisputed Facts ("Pl. 56.1") ¶ 2. Traffic Stream is the parent of four wholly-owned subsidiaries. *Id.* ¶ 4. All four subsidiaries are incorporated in Hong Kong (collectively, the "Hong Kong Subsidiaries"). *Id.* According to defendant,

1. The Indenture also includes a choice of law provision which states: "This Indenture and the Notes shall be governed by and construed in accordance with the laws of the State of New York." Indenture, Ex. A to Reid Aff., § 111. Accordingly, New York law governs the instant dispute.

the Hong Kong Subsidiaries are its sole assets and its sole source of income. Defendant's Rule 56.1 Statement of Undisputed Facts ("Def. 56.1") ¶ 45.[2]

Through its Hong Kong Subsidiaries, Traffic Stream owns interests in thirteen Chinese-foreign cooperative joint ventures (the "Joint Ventures"). Pl. 56.1 ¶ 3. Each Joint Venture is comprised of a foreign partner — one of the Hong Kong Subsidiaries — and a Chinese partner. Def. 56.1 ¶ 48. The Joint Ventures are engaged in the development, construction and operation of six toll-road projects in China. Pl. 56.1 ¶ 3; Def. 56.1 ¶ 44.

B. The Indenture

In order to finance the Chinese toll-road projects, Traffic Stream entered into the Indenture with Chase. 11/1/99 Declaration of Wong Kwok Choi, Executive Director of Traffic Stream, ("Wong Decl.") ¶ 4. As set forth above, pursuant to the Indenture, Traffic Stream issued 14 1/4 percent Notes in an aggregate amount of $119,000,000. Pl. 56.1 ¶ 5. The Notes are due in 2006. *Id.*

Under the terms of the Indenture, Traffic Stream is required to make semi-annual interest payments on the Notes. *Id.* ¶ 7. The payments are due in May and November of each year, commencing in November 1998. *Id.*

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2. Plaintiff does not concede that the Hong Kong Subsidiaries are defendant's sole assets and sole source of income. *See* Plaintiff's Reply Memorandum of Law in Further Support of its Motion for Summary Judgment ("Pl. Reply") at 2. However, plaintiff accepts defendant's assertion as true for purposes of this summary judgment motion. *Id.*

As collateral for Traffic Stream's payment obligations, the Indenture grants Chase first priority security interests in four accounts maintained by defendant: (i) the Debt Service Reserve Account; (ii) the Construction Funding Account; (iii) the Joint Venture Distribution Account; and (iv) the Note Redemption Account (collectively, the "Collateral Accounts"). *Id.* ¶¶ 7-9. In addition, Traffic Stream executed a Letter of Credit Procurement and Deposit Agreement ("LOC and Deposit Agreement") pursuant to which Traffic Stream promised to deliver a letter of credit in the amount of $8,058,750 to Chase by January 6, 1999.[3] *Id.* ¶ 14; LOC and Deposit Agreement, Ex. B to Reid Aff., ¶ 1. Traffic Stream further promised to replace the letter of credit with cash currency on or before May 6, 1999, by depositing $8,058,750 into the Construction Funding Account. Pl. 56.1 ¶ 15.

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3. Technically, Traffic Stream did not itself undertake to procure the required letter of credit. Rather, four additional parties to the LOC and Deposit Agreement — three corporate entities and one individual — agreed to procure and deliver the letter of credit to Chase. LOC and Deposit Agreement, Ex. B to Reid Aff., ¶ 1. The precise nature of the relationship between defendant and the four entities directly responsible for procurement of the letter of credit is unclear from both the face of the LOC and Deposit Agreement and the parties' submissions. However, there is no question that the entities are closely tied to both defendant and the toll-road projects. *Id.* at preamble. Moreover, as discussed *infra*, the failure to deliver the $8,058,750 letter of credit constitutes a default under the Indenture to which only Traffic Stream and Chase are parties. Accordingly, to avoid confusion and for the sake of simplicity, I refer to all obligations under the LOC and Deposit Agreement as "Traffic Stream's" obligations.

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Section 501 of the Indenture explicitly states that any failure by defendant to make timely interest payments or to procure the required letter of credit constitutes an "Event of Default". Section 501 provides, in relevant part, as follows:

> "Event of Default", wherever used herein, means any one of the following events (whatever the reason for such Event of Default and whether it shall be voluntary or involuntary or be effected by operation of law or pursuant to any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body):
>
> (1) default in the payment of any interest, including Additional Interest, if any, and Additional Amounts, if any, in respect of interest on any Note when it becomes due and payable and continuance of such default for a period of five Business Days; or
>
> . . . .
>
> (4) the failure to deliver to the Trustee the [letter of credit] on or before January 6, 1999 as provided in the LOC and Deposit Agreement (unless the [cash] Deposit shall have been made on or before January 6, 1999) . . . .

Indenture, Ex. A to Reid Aff., § 501(1),(4). The failure to pay "the principal of or premium, if any, on any Note when it becomes due and payable at its Stated Maturity, or the

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failure to redeem Notes in the required principal amounts on any Mandatory Redemption Date" is also an Event of Default under section 501. *Id.* § 501(2).

Pursuant to section 502 of the Indenture, if an Event of Default occurs, Chase, as Trustee, or the Note holders may "declare the principal of, premium, if any, and accrued interest on all of the Outstanding Notes immediately due and payable, and upon any such declaration all such amounts payable in respect of the Notes shall become immediately due and payable." *Id.* § 502.[4] The Indenture further provides that if defendant defaults upon the payment of interest, principal or premium, the defendant must, upon demand by plaintiff, pay the whole amount due plus "such further amount as shall be sufficient to cover the costs and expenses of collection, including the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel." *Id.* § 503.

Finally, section 1009 of the Indenture requires defendant to provide the Trustee with a variety of financial statements and reports. *Id.* § 1009.

C. Traffic Stream's Defaults Under the Indenture

Traffic Stream timely tendered the first required interest payment on November 1, 1998. Pl. 56.1 ¶ 22. Since that time, however, Traffic Stream has committed multiple defaults under the Indenture.

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4. Specifically, the Indenture allows "the Trustee or Holders of not less than 25% in aggregate principal amount of the Notes Outstanding" to accelerate payment. Indenture, Ex. A to Reid Aff., § 502.

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1. Failure to Deliver Letter of Credit

Traffic Stream failed to deliver the required $8,058,750 letter of credit to Chase by January 6, 1999. *Id.* ¶ 24. Such failure constitutes an Event of Default under section 501(4) of the Indenture. *Id.*; Def. 56.1 ¶ 24; Indenture, Ex. A to Reid Aff., § 501(4).[5]

2. Failure to Pay Accelerated Principal

On March 24, 1999, holders of more than 25 percent of the Notes delivered to defendant a Declaration of Acceleration (the "Declaration") pursuant to section 502 of the Indenture. Pl. 56.1 ¶ 26. As a result of the Declaration, the Notes became immediately due and payable. The Declaration also demanded, pursuant to section 503, "the immediate payment in full" of the Notes. *Id.* ¶ 27. Despite the acceleration of the Notes and the demand for immediate

5. Defendant did deliver a letter of credit in the amount of $4,460,000 to Chase on January 11, 1999. Pl. 56.1 ¶ 25. And, on February 12, 1999, defendant delivered to Chase a second letter of credit in the amount of $1,100,000. *Id.* Not only were these letters of credit untimely, they were also insufficient; combined, the letters were in an amount $2,498,750 less than the amount required under the LOC and Deposit Agreement. *Id.*

Traffic Stream also failed to deposit $8,058,750 cash in the Construction Funding Account by May 6, 1999, as required under the LOC and Deposit Agreement. As a result, plaintiff drew the entire amount available under defendant's January 11 and February 12 letters of credit. Pl. 56.1 ¶ 30. However, because defendant failed to procure letters of credit in the required amount, a balance of $2,498,750 remains unpaid and owing to plaintiff under the LOC and Deposit Agreement. *Id.*

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payment, defendant has failed to pay any amounts on the Notes. *Id.* ¶ 27; Def. 56.1 ¶ 27. Such failure constitutes an Event of Default under section 501(2) of the Indenture. Pl. 56.1 ¶ 28; Def. 56.1 ¶ 28; Indenture, Ex. A to Reid Aff., ¶ 501(2).

3. Failure to Pay Interest and Provide Reports

Not only did Traffic Stream fail to honor the holders' demand for "immediate payment in full", it also failed to tender the May 1999 interest payment, which was required even in the absence of the acceleration and demand for payment. Pl. 56.1 ¶ 30. Defendant's failure to make the scheduled interest payment constitutes an Event of Default under section 501(1) of the Indenture. *Id.;* Def. 56.1 ¶ 28; Indenture, Ex. A to Reid Aff., § 501(1).[6]

Finally, Traffic Stream failed to provide certain financial statements and reports to the Trustee as required under section 1009 of the Indenture. Pl. 56.1 ¶ 32.

D. Procedural History

In response to defendant's defaults, Chase commenced the instant action on June 4, 1999.[7] The complaint sets forth

6. It appears that Traffic Stream similarly failed to pay the third installment of accrued interest which came due on November 1, 1999, during the briefing of the instant motion. *See* 11/17/99 Affidavit of Francis J. Grippo, a vice president of Chase, ("Grippo Aff.") ¶ 8; Wong Decl. ¶ 23.

7. Chase brought suit pursuant to section 503 of the Indenture which authorizes the Trustee to institute a judicial proceeding, in its own name, for the collection of sums due, specific performance of the Indenture or any other appropriate remedy. Indenture, Ex. A to Reid Aff., § 503.

five claims: (i) breach of contract; (ii) replevin of collateral; (iii) specific enforcement of defendant's reporting obligations; (iv) an accounting; and (v) recovery of costs for collection. Complaint ¶¶ 32-52. With respect to claims one and two, Chase seeks turnover of the Collateral Accounts as well as damages in the form of a deficiency judgment equal to the difference in value between the Collateral Accounts and the total amount of defendant's indebtedness.[8] *Id.* ¶ 52.

Traffic Stream concedes that it is in default under the Indenture as a result of its failure to post the required letter of credit and its failure to make the required payments. Def. 56.1 ¶¶ 24, 27-28. However, Traffic Stream asserts the legal defense of impossibility with respect to claims one and two — breach of contract and replevin of collateral. *Id.* ¶ 37. Traffic Stream does not assert any legal defenses in connection with Chase's claims for specific performance, an accounting or collection costs. *Id.*

E. Chinese Law and The SAFE Notice

Defendant's impossibility defense to Chase's claims for breach of contract and replevin of collateral is based on an alleged change in Chinese policy regarding remittance of guaranteed funds to foreign investors. According to defendant, the alleged policy change occurred in September 1998.[9]

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8. According to plaintiff, as of October 31, 1999, defendant's total indebtedness under the Indenture was $137,352,444, including $119,000,000 in principal and $11,312,437 in accrued, unpaid interest. Grippo Aff. ¶ 8. Interest continues to accrue on the Notes at a rate of $55,142 per day. *Id.*

9. Plaintiff does not concede the occurrence of a change in (Cont'd)

1. The Joint Ventures

The contracts governing the Joint Ventures guarantee the Hong Kong Subsidiaries, as foreign partners, a fixed annual return on their investments in the toll-road projects. Def. 56.1 ¶ 47; Wong Decl. ¶ 3. If the income generated by a Joint Venture (the "Operating Income") is less than the fixed annual rate of return, the Chinese partner is obligated to pay the difference to the foreign partner from its own funds (the "Guaranteed Income"). Def. 56.1 ¶ 48; Wong Decl. ¶ 3. According to defendant, the fixed annual rate of return is sufficient to cover all interest payments due under the Indenture. Wong Decl. ¶ 5.

2. Remittance of Income

Distribution of funds from the Joint Ventures to their foreign partners is regulated by Chinese law. Def. 56.1 ¶ 47; Jingtian Associates Opinion Re: Guarantee of Foreign Party's Investment Return ("Jingtian Op."), Ex. A to 11/2/99 Declaration of Zhao Yang ("Zhao Decl."), at 1.[10]

(Cont'd)
Chinese policy. Pl. Reply at 2. Indeed, as discussed *infra* Part IV.A., plaintiff contends that defendant's impossibility arguments regarding a change in Chinese policy are based solely on hearsay and should be rejected on that basis alone. *Id.* at 2-3; Plaintiff's Memorandum of Law in Support of Its Motion for Summary Judgment ("Pl. Mem.") at 11-13.

10. Zhao Yang is defendant's legal counsel "in connection with the laws and regulations of the People's Republic of China." Zhao Decl. ¶ 1. Zhao issued the Jingtian Opinion on behalf of Jingtian Associates, a Beijing law firm. *Id.* ¶ 2.

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Under Chinese law, remittance of guaranteed income to foreign partners has "consistently" been under the "restriction, supervision and regulation" of the central Chinese Government, specifically China's State Administration of Foreign Exchange ("SAFE").[11] *Id.* In fact, pursuant to a notice issued by SAFE in April 1994, "the Chinese party in a [Chinese-foreign cooperative joint venture] shall not guarantee the foreign party's investment return rate, as it does in loans, bonds, or other forms. The said guarantee of investment return rate cannot be recognized or enforced by relevant Chinese authorities." *Id.*

Despite the central government's long-time prohibition against guaranteed income remitted by Chinese partners to foreign partners, local authorities regularly approved remittance of such income prior to 1998. The Jingtian Opinion explains that

> [a]lthough Chinese party's guarantee of foreign party's investment return rate in [a Chinese-foreign cooperative joint venture] is restricted by the State, such guarantee can possibly still be found in some places in China. Before September 1998, local foreign exchange authorities in some places in China allowed foreign investors in [Chinese-foreign cooperative joint ventures] to remit abroad their income obtained from the said guarantee abroad without obtaining special approval from SAFE.

Id. at 2.

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11. In contrast, remittance to foreign investors of after-tax profit or dividends may be made without prior approval of SAFE. Jingtian Op., Ex. A to Zhao Decl., at 2.

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In the wake of the 1997 Asian financial crisis, the Chinese Government realized that many foreign investment projects were depleting China's foreign exchange reserve rather than generating income for the State. *Id.* at 2-3; Wong Decl. ¶ 15. This situation was created, in part, by the practice of Chinese partners guaranteeing income to their foreign investment partners. Wong Decl. ¶ 15. To remedy the situation, the Chinese Government strengthened its supervision of foreign exchange and foreign debt. *Id.*; Jingtian Op. at 2-3. Of particular relevance to the instant litigation is a notice issued by SAFE on September 14, 1998 (the "SAFE Notice").[12] Among other things, the SAFE Notice requires "strict supervision of guarantees provided by domestic entities in connection with overseas financing activities of such entities." *See* 9/28/98 People's Daily Newspaper Article ("People's Daily Art."), Ex. A to Declaration of Patricia J. Wang, legal assistant to defendant's counsel Skadden, Arps, Slate, Meagher & Flom ("Wang Decl."), at 4.[13] Pursuant to the SAFE Notice,

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12. As discussed *infra* Part IV.A., the SAFE Notice is a confidential document of the Chinese Government that has not been publicly released. Zhao Decl. ¶ 3. As a result, neither defendant nor plaintiff have reviewed the document. *Id.* Defendant's descriptions of the terms and effects of the SAFE Notice are based on newspaper articles and discussions with Chinese authorities. Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment ("Def. Opp.") at 23-24.

13. The People's Daily news article was downloaded on September 18, 1999 from the Internet website address of Chinainfobank (www.Chinainfobank.com) by Haoling Liu, a legal assistant in the Beijing office of defendant's counsel Skadden Arps.

(Cont'd)

> organizations must get . . . approval from [SAFE] and file with [SAFE] any required documentation if they need to provide guarantee to support the issuance of overseas debt. If the local government or entity violates [and] provide[s] the guarantee without prior approval, any loan or guarantee agreements shall be invalid, banks shall not open foreign exchange accounts for such guarantee, and the principal and the interest of such foreign debt shall not be permitted to be remitted abroad. . . .
>
> . . . [T]he entities that have incurred foreign debts will be examined in order to make sure that all foreign debts are properly serviced.

Id. According to defendant's legal counsel in China, the practical effects of the SAFE Notice are as follows:

> As a result [of the SAFE Notice], income obtained by foreign parties in [Chinese-foreign cooperative joint ventures] from the said guarantee can be remitted abroad only after obtaining special approval from SAFE, which may need a

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10/10/99 Declaration of Haoling Liu ("Haoling Decl.") ¶¶ 1-2. Chinainfobank is a Hong Kong company which provides Chinese Business and legal information to its users. *Id.* ¶ 2. According to Chinainfobank, the news article originally appeared in the September 18, 1998 edition of the People's Daily, the official newspaper of the Chinese Government. *Id.* The article, published in Chinese, was translated into English by Wang of Skadden Arps's New York office. Wang Decl. ¶ 2.

> comparatively long period of time. Consequently, if the [Joint Ventures are] engaged in such fixed return provided by the Chinese party, remittance of income [to Traffic Stream] from the said guarantee shall need special approval from SAFE.
>
> . . . Measures taken by the Chinese government in September 1998 to strengthen foreign exchange and foreign debt regulation shall have little material negative impact on [the Joint Ventures] with respect to the remittance of after-tax profit or dividend. However, since the examination has gotten more restrictive, the remittance of profit or dividend will need substantially more time.

Jingtian Op., Ex. A to Zhao Decl., at 3. In other words, the SAFE Notice has "little material negative impact" on the remittance of Operating Income to Traffic Stream. However, the remittance of Guaranteed Income to Traffic Stream requires prior approval from SAFE.

3. Effects of SAFE Notice on Traffic Stream

By October 1998, Traffic Stream, through its Hong Kong Subsidiaries, had received income remittances from the Joint Ventures sufficient to cover the November 1998 interest payment. Wong Decl. ¶ 11. On April 27, 1999, in anticipation of the May 3, 1999 interest payment, two Joint Ventures operating toll roads in the Shandong province applied to local authorities for remittance of Guaranteed Income to the Hong Kong Subsidiaries. *Id.* ¶ 14. The local authorities rejected

the Joint Ventures' request explaining that, pursuant to the September 1998 SAFE Notice, remittance of Guaranteed Income may only be authorized by SAFE.[14] *Id.* Defendant claims that prior to April 27, 1999, neither defendant nor its subsidiaries was aware of the SAFE Notice. *Id.* ¶ 11.

Upon learning of the policy change, the Joint Ventures together with the local Shandong authorities, contacted SAFE seeking immediate approval for the Joint Ventures' requested remittance of Guaranteed Income. *Id.* ¶ 18. SAFE refused, insisting that the Joint Ventures submit appropriate documentation to SAFE for approval of the toll-road projects. *Id.* According to defendant, SAFE "emphasized that only upon the granting of such reapproval would the Guaranteed Income be permitted to be remitted." *Id.* Although the Joint Ventures continued to lobby local authorities and SAFE for remittance prior to May 3, their efforts proved fruitless. *Id.* ¶¶ 19-20.

On May 16, 1999, the local Shandong authorities approved remittance to the Hong Kong Subsidiaries of the Operating Income for the Shandong Joint Ventures.[15]

14. According to defendant, even prior to issuance of the SAFE Notice, it took local authorities approximately two weeks to approve requests for foreign income remittance. Wong Decl. ¶ 8. As a result, even absent the SAFE Notice, it is unlikely that defendant would have received remittance of funds requested on April 27, 1999 by May 3, 1999.

15. Notably, approval for remittance of Operating Income was granted little more than two weeks after the Joint Ventures submitted their request on April 27. Thus, the SAFE Notice delayed approval for remittance of Operating Income by only a few days. *See supra* note 14; Wong Decl. ¶ 8.

Id. ¶ 20. However, the Operating Income generated by those Joint Ventures prior to May 1999 was insufficient to cover the required interest payment. *Id.* Since May, the Joint Ventures have persistently requested that local Shandong authorities submit the Shandong toll-road projects to SAFE for approval. *Id.* ¶¶ 21-24. To date, the appropriate documentation has not been submitted to SAFE.[16] *Id.* ¶ 24.

Traffic Stream claims that it "has done and continues doing all that is humanly possible within the framework of the Chinese administrative 'maze' to obtain approval for remittance of the Guaranteed Income." *Id.* ¶ 26. According to Traffic Stream, "[t]he regulatory and policy changes in [China] were completely beyond [defendant's] control and not within its reasonable anticipation." *Id.* ¶ 29.

III. Applicable Legal Standard

A motion for summary judgment may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "[G]enuineness runs to whether disputed factual issues can reasonably be resolved in favor of either party, [while] materiality runs to whether the dispute

16. The SAFE Notice primarily affects the two Shandong Joint Ventures because those Joint Ventures have consistently failed to generate Operating Income sufficient to fund their foreign partners' fixed annual return. Wong Decl. ¶ 16. As a result, the Chinese partners for those particular Joint Ventures must make up the shortfall through Guaranteed Income.

matters, i.e., whether it concerns facts that can affect the outcome under the applicable substantive law. A reasonably disputed, legally essential issue is both genuine and material and must be resolved at trial." *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 5 (2d Cir. 1999) (internal quotations and citations omitted).

In assessing the record to determine whether genuine issues of material fact are in dispute, courts must resolve all ambiguities and draw all reasonable factual inferences in favor of the non-moving party. *See Nora Beverages, Inc. v. Perrier Group of Am., Inc.*, 164 F.3d 736, 742 (2d Cir. 1998). The moving party bears the initial burden of demonstrating an absence of genuine issues of material fact. *See Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997). However, if the moving party meets its initial burden, the non-moving party cannot rely upon conclusory allegations or speculation to create factual disputes. Instead, the non-moving party "must produce specific facts indicating that a genuine issue of fact exists. If the evidence [presented by the non-moving party] is merely colorable, or is not significantly probative, summary judgment may be granted." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998) (internal quotations and citations omitted) (alteration in original).

IV. Discussion

As set forth above, the sole issue to be resolved on summary judgment is whether defendant can plausibly maintain an impossibility defense based upon what it alleges is a change in Chinese policy regarding remittance of guaranteed income to foreign investors. Plaintiff contends that summary judgment is appropriate for three reasons.

First, plaintiff argues that evidence regarding the SAFE Notice cannot be used to defeat summary judgment because such evidence is inadmissible hearsay. *Second*, plaintiff claims that the express language of the Indenture precludes defendant from asserting an impossibility defense. *Third*, plaintiff contends that even assuming defendant's impossibility defense is not explicitly barred by the Indenture, defendant cannot make a legal showing of impossibility. Plaintiff's arguments are discussed in turn below.

A. Admissibility of Evidence Surrounding SAFE

Defendant's impossibility defense is premised on the SAFE Notice. As set forth above, however, the SAFE Notice is a confidential document of the Chinese government. *See supra* note 12; Zhao Decl. ¶ 3. Defendant does not possess — and cannot produce — a copy of the SAFE Notice. Zhao Decl. ¶ 3. Instead, defendant has provided Chase and this Court with a People's Daily newspaper article and an opinion by Chinese legal counsel describing "the [SAFE] Notice and its resulting consequences." Def. Opp. at 22.

Plaintiff contends that the People's Daily article is inadmissible hearsay because it is being proffered for the truth of its contents. *See* Pl. Reply at 7. Plaintiff argues that hearsay evidence that is not admissible at trial cannot be used to defeat a motion for summary judgment. *Id.* Plaintiff also complains that the Jingtian Opinion "is opaque at best as to what the SAFE Notice actually is intended to do." Pl. Mem. at 12. Stated succinctly, it is plaintiff's position that "[w]ithout providing the underlying [SAFE] Notice which is the foundation for its claim that a change in Chinese law

made performance impossible, Traffic Stream cannot escape" an adverse ruling. *Id.* at 11.

It is well-settled that inadmissible hearsay evidence cannot be used to create an issue of fact on summary judgment. *See McNamara v. Guanzzoni*, 99 Civ. 4058, 1999 WL 322648, *3 (S.D.N.Y. May 20, 1999). There is no question that the People's Daily article is hearsay; it is an out-of-court, unsworn statement being offered for the truth of its contents. *See* Fed. R. Evid. 801. However, that the article is hearsay does not necessarily mean it is inadmissible. There are numerous exceptions to the general rule barring hearsay evidence at trial.

Federal Rule of Evidence 807 sets forth a residual hearsay exception that is applicable to the instant case. Rule 807 provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The People's Daily article is offered as evidence of a material fact, namely a change in Chinese policy which rendered

defendant's performance under the Indenture impossible. It is also the most probative evidence of the SAFE Notice that defendant can reasonably procure in light of the fact that the SAFE Notice has not been publicly released by the Chinese Government. Similarly, because the SAFE Notice is itself unavailable, the interests of justice would be best served by admission of the article. A large sum of money is at stake in this litigation, and defendant's sole defense is based on the SAFE Notice. To preclude the article would bar defendant from even trying to prove a defense of impossibility.

Finally, the People's Daily article has sufficient guarantees of trustworthiness. The People's Daily is published by the Chinese Communist Party's Central Commission, and it "is deemed to be authoritative and representing the official opinion of the Chinese Government." Haoling Decl. ¶ 2. In other words, there is little risk that a government controlled newspaper such as the People's Daily would inaccurately reflect the official position of its government. Accordingly, the People's Daily article may properly be considered on summary judgment, and defendant's impossibility defense is not precluded simply because the SAFE Notice is unavailable.[17]

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17. Rule 807 also includes the following notification requirement:

> [A] statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the

(Cont'd)

Plaintiff further argues, with reasonable basis, that the Jingtian Opinion is "opaque". Both the newspaper article and the legal opinion are less than models of clarity. That said, the terms and effects of the SAFE Notice are set forth with sufficient clarity for plaintiff to rebut, and for the Court to evaluate, the merits of defendant's impossibility defense.

B. Impossibility of Performance

Defendant argues that its defaults should be excused pursuant to the doctrine of impossibility, because a change in Chinese policy — the issuance of the SAFE Notice — has delayed Traffic Stream's ability to collect monies from the toll-road projects, making it "impossible" for Traffic Stream to fulfill its payment obligations under the Indenture. *See* Def. Opp. at 11.

Impossibility is a common law contract doctrine which excuses performance under very limited and narrowly-defined circumstances. *See Kel Kim Corp. v. Central Markets,*

(Cont'd)

> statement and the particulars of it, including the name and address of the declarant.

Fed. R. Evid. 807. On September 21, 1999, Traffic Stream provided Chase with an untranslated copy of the People's Daily article. *See* 9/21/99 letter from defendant's counsel Shmuel Vasser to plaintiff's counsel Sarah Reid, Ex. 6 to Reid Aff. On September 28, 1999, Traffic Stream provided Chase with a translated copy of the article. *See* 9/28/99 facsimile from Vasser to Reid, Ex. 7 to Reid Aff. Clearly, defendant has "made known" its intention to offer the People's Daily article sufficiently in advance of any potential hearing or trial in this matter.

Inc., 70 N.Y.2d 900, 902 (1987) (impossibility has been "applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances"). In *Kel Kim*, the New York Court of Appeals explained the impossibility defense as follows:

> Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must have been produced by an unanticipated event that could not have been foreseen or guarded against in the contract.

Id. Under New York law, where "the risk which causes the alleged impossibility of performance is foreseen, accounted for, and allocated in the contract, failure to perform cannot be excused." *Bank of Am. Nat'l Trust & Savs. Assoc. v. Envases Venezolanos, S.A.*, 740 F. Supp. 260, 267 (S.D.N.Y. 1990).

Plaintiff argues that defendant's impossibility defense must fail as a matter of law, both because it is precluded by the plain language of the Indenture and because defendant cannot make a showing of impossibility.

1. Impossibility Defense Barred by Indenture

Plaintiff contends that section 501 of the Indenture expressly bars defendant from asserting any impossibility

defense based upon a change in Chinese law. As set forth above, the preamble to section 501 states:

> "Event of Default", wherever used herein, means any one of the following events (whatever the reason for such Event of Default and whether it shall be voluntary or involuntary or be effected by operation of law or pursuant to any judgment, decree or order of any court *or any order, rule or regulation of any administrative or governmental body*) . . . .

Indenture, Ex. A to Reid Aff., § 501 (emphasis added); *see also supra* Part II.B. According to plaintiff, section 501 anticipates the possibility that government action might cause an event of default, and it assigns the risk of such government-induced default to defendant. *See* Pl. Mem. at 20.

The preamble of section 501 quoted above is identical to section 501 of the Model Debenture Indenture Provision. *See* Model Debenture Indenture Provision § 501 (1965). According to the American Bar Foundation Commentaries on the Model Debenture Indenture Provisions ("Model Indenture Commentaries"), "[t]he parenthetical clause in the first sentence of Section 501 has the purpose of refuting any argument that events resulting from *force majeure* were not intended to be treated as defaults." American Bar Foundation, Corporate Debt Financing Project, Commentaries on Model Debenture Indenture Provisions 205 (1971) (emphasis in original). Plaintiff cites the Model Indenture Commentaries as further support for its contention that section 501 assigns

the risk of adverse government action to defendant, and thus precludes defendant's impossibility defense. *See* Pl. Mem. at 20.[18]

a. Section 501 Interpreted as a Matter of Law

In a contract dispute, summary judgment may be granted where the relevant contract language is unambiguous and conveys a definite meaning. *See Sayers v. Rochester Tel. Corp. Supplemental Pension Plan*, 7 F.3d 1091, 1094 (2d Cir. 1993). Ambiguity is a question of law to be determined by the court. *See id.*; *Thomas De La Rue AG v. United States Banknote Corp.*, 979 F. Supp. 968, 971 (S.D.N.Y. 1997). Contract language is ambiguous where

> it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992) (internal quotations omitted). In contrast, contract language is unambiguous where it "has a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which

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18. Section 501 is the only provision in the indenture that addresses force majeure events. The Indenture does not include a force majeure clause. Defendant's argument to the contrary is discussed *infra* Part IV.B.1.b.

there is no reasonable basis for a difference in opinion." *Id.* (alteration in original). Moreover, contract language "is not made ambiguous simply because the parties urge different interpretations. Nor does ambiguity exist where one party's view strain[s] the contract language beyond its reasonable and ordinary meaning." *Id.* (internal quotations omitted) (alteration in original).

Moreover, section 501 is a "boilerplate" indenture provision. *See Sharon Steel Corp. v. The Chase Manhattan Bank*, 691 F.2d 1039, 1048 (2d Cir. 1982) (defining "boilerplate" provisions as "contractual provisions which are standard in a certain genre of contracts" such as indentures); *see also* Model Debenture Indenture Provision § 501. The Second Circuit has long held that the meaning of "boilerplate" provisions should be determined by courts as a matter of law. *See id.*[19]

---

19. In *Sharon Steel Corp.*, the Court of Appeals stated:

> Boilerplate provisions are . . . not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties to an indenture. There are no adjudicative facts relating to the parties to the litigation for a jury to find and the meaning of boilerplate provisions is, therefore, a matter of law rather than fact.
>
> Moreover, uniformity in interpretation is important to the efficiency of capital markets. . . . [T]he creation of enduring uncertainties as to the meaning of boilerplate provisions would decrease the value of all debenture issues and greatly impair the efficient working of capital

(Cont'd)

b. Section 501

Under the plain language of section 501, the failure to tender a required payment constitutes an Event of Default, regardless of whether that failure was caused by a change in government policy. As plaintiff persuasively argues, the Indenture anticipates the risk of adverse government action, and it assigns that risk to defendant. *See* Pl. Mem. at 20; Model Indenture Commentaries 205. Accordingly, defendant's impossibility defense based on the SAFE Notice is precluded by the unambiguous terms of the Indenture.[20] *See Venezolanos*, 740 F. Supp. at 267 (barring defendant's impossibility defense where contract allocated risk that created the impossibility to defendant). Defendant's arguments to the contrary are inconsistent with the language of the Indenture, the Model Indenture Commentaries and general principles of contract law.

(Cont'd)

> markets. . . . Just such uncertainties would be created if interpretation of boilerplate provisions were submitted to juries sitting in every judicial district in the nation.

691 F.2d at 1048.

20. This Court makes no finding as to whether the Indenture precludes an impossibility defense based on a force majeure occurrence not explicitly set forth in the preamble to section 501. There is no need to reach this issue because it is undisputed that the SAFE Notice falls within the language of the preamble as an "order, rule or regulation of . . . a governmental body". Indenture, Ex. A to Reid Aff., § 501.

First, defendant draws a distinction between the issue of whether a default has occurred and the issue of whether a default is excused. *See* Def. Opp. at 15. According to defendant, section 501 determines only that a default has occurred; it does not address whether a particular default is excused pursuant to impossibility. *See id.* Thus, although defendant admits that its failure to make the required payments is an Event of Default under section 501, defendant claims that the language of section 501 regarding government action does not preclude its impossibility defense. Defendant's position is untenable.

In the instant case, defendant's distinction between an "occurrence of default" and an "excuse of default" is nothing more than a sleight-of-hand word game. Properly characterized, defendant is arguing that although Traffic Stream's failure to perform due to the SAFE Notice constitutes an "Event of Default", that default is excused because of the SAFE Notice. *See id.* at 15-16. This argument, however, renders the preamble clause of section 501 meaningless. If government action and other force majeure events can excuse a default under the Indenture, then section 501's clear instruction — that even if defaults are caused by force majeure events, they are to be treated as defaults — has no effect. *See* Model Indenture Commentaries 205 (section 501 "has the purpose of refuting any argument that events resulting from *force majeure* were not intended to be treated as defaults"). Defendant's reading of section 501 violates a basic tenet of contract law, namely that "[i]n construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless." *Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Assocs.*, 482 N.Y.S.2d 465, 468 (1984).

Defendant's theory similarly ignores the undisputed fact that section 501 is a triggering provision for the comprehensive scheme of default remedies set forth in the contract. That is, once defendant's failure to perform is classified as an Event of Default under section 501, plaintiff may take advantage of all available remedies under the Indenture, including litigation. *See, e.g.*, Indenture, Ex. A to Reid Aff., §§ 502, 503. The interplay between section 501 and the remedy provisions further highlights defendant's strained interpretation of section 501. Under defendant's theory, even though Traffic Stream's failure to perform due to the SAFE Notice is an Event of Default such that plaintiff may commence litigation, the SAFE Notice may be used as a defense to that litigation. This is a flawed argument that cannot be reasonably supported by the plain language of the Indenture. As plaintiff explains: "It makes no sense whatsoever as a matter of contract construction for a default based upon a change in law or governmental act to be explicitly identified as an Event of Default so as to bring suit against the Issuer, if the defendant could then simply claim that this same change of law also excused its defaults for which it has been sued." Pl. Mem. at 8.

Second, defendant claims that section 514 of the Indenture is a general waiver provision "dealing with *force majeure* type defenses". Def. Opp. at 19 (emphasis in original). Defendant argues that because section 514 does not waive impossibility, impossibility is an available defense under the Indenture, regardless of the plain language of section 501. *See id.* Defendant's argument is puzzling to say the least, considering that section 514 is not a general waiver provision nor does it in any way address events of default or force majeure type defenses.

Appendix C

Section 514, entitled "Waiver of Stay or Extension Laws", states:

> The Company covenants (to the extent that it may lawfully do so) that it will not at any time insist upon, or plead, or in any manner whatsoever claim or take the benefit or advantage of, any stay or extension law wherever enacted, now or at any time hereafter in force, which may affect the covenants or the performance of this Indenture; and the Company (to the extent that it may lawfully do so) hereby expressly waives all benefit or advantage of any such law and covenants that it will not hinder, delay or impede the execution of any power herein granted to the Trustee, but will suffer and permit the execution of every such power as though no such law had been enacted.

Indenture, Ex. A to Reid Aff., § 514. Stay or extension laws such as a stay of foreclosure or a stay of execution are procedural protections "designed for the relief of debtors, in times of general distress or financial trouble". *See* Black's Law Dictionary 983 (6th ed. 1990). Thus, section 514 is nothing more than an affirmative agreement by defendant to forgo the benefit of any applicable stay or extension laws. It is not a general waiver of contractual defenses.

Moreover, defendant's claim that section 514 is "the specific section dealing with *force majeure* type defenses", Def. Opp. at 19, is absurd. A force majeure clause "excus[es] nonperformance due to circumstances beyond the control of the parties." *Kel Kim*, 70 N.Y.2d at 903. Section 514 has

Appendix C

nothing to do with nonperformance, let alone nonperformance beyond the defendant's control.[21]

The bottom line is that defendant cannot escape the plain language of section 501 which demands performance regardless of whether such performance is rendered "impossible" by an uncontrollable act such as a change of law. Defendant is a sophisticated company involved in high-risk business ventures. Defendant could have included a force majeure provision in the indenture, but it failed to do so. Instead, defendant entered into an agreement that explicitly precludes force majeure events as a defense to full performance.

---

21. A comparison of section 514 and a classic force majeure clause further demonstrates the absurdity of defendant's argument. Set forth below is the force majeure provision at issue in *Kel Kim*:

> If either party to this [agreement] shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay.

70 N.Y.2d at 902 n.*. Clearly, section 514 is not a force majeure clause nor does it address force majeure defenses. What is interesting, however, are the similarities between section 501 and the *Kel Kim* force majeure provision. Essentially, they are mirror images. The *Kel Kim* provision sets forth force majeure events that excuse performance, while section 501 sets forth force majeure events that do not excuse performance.

2. No Showing of "Impossibility"

Assuming arguendo that section 501 does not itself bar defendant's claim of impossibility, defendant's claim must still fail because defendant cannot, as a matter of law, meet the requirements of an impossibility defense. I note at the outset, that parties attempting to invoke impossibility of performance have an uphill battle. New York courts have been consistently hostile to the defense, allowing it to excuse performance only in the most extreme circumstances.

a. Objectively Impossible

As set forth above, the first element of an impossibility defense is a showing by defendant that performance has been rendered objectively impossible: "Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible." *Kel Kim*, 70 N.Y.2d at 902; *see also 407 East 61st Garage, Inc. v. Savoy Fifth Avenue Corp.*, 23 N.Y.2d 275, 281 (1968) ("[I]mpossibility of performance is limited to the destruction of the means of performance by an act of God, vis major, or by law.").

Of particular relevance to this case is the well-settled rule in New York that " 'where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused.' " *Venezolanos*, 740 F. Supp. at 267 (quoting *407 East 61st Garage*, 23 N.Y.2d at 281); *see also Barclays Bus. Credit, Inc. v. Inter Urban Broad. of Cincinnati, Inc.*, 90 Civ. 2272,

1991 WL 258751, *8 (S.D.N.Y. 1991) (finding that "New York law is absolutely clear" regarding rule that impossibility cannot be premised on financial hardship, no matter how severe). Moreover, even where the financial hardship is caused by a government policy, performance cannot be excused as "impossible": "[A]bsent an express contingency clause in the agreement allowing a party to escape performance under certain specified circumstances, compliance is required even where the economic distress is attributable to the imposition of governmental rules and regulations or the inability to secure financing." *Stasyszyn v. Sutton E. Assocs.*, 555 N.Y.S.2d 297, 299 (1st Dep't 1990).

Defendant's allegations of impossibility fall squarely within this line of "financial hardship" cases. According to defendant,

> [i]t is undisputed that as a result of the regulatory changes in China, Traffic Stream's only source of income — the remittance of guaranteed payments by Chinese joint venture partners — has dried up. Thus, the regulatory change, which indisputably has delayed the ability to collect guaranteed payments out of China, has made it impossible for Traffic Stream to make the required payments within the time frames set forth in the Indenture.

Def. Opp. at 11. Stripping away the conclusory language, Traffic Stream merely alleges that the SAFE Notice has "delayed" its ability to collect payments from the Joint Ventures, leaving Traffic Stream without enough money to meet its financial obligations. However, lack of funds, "even

to the extent of insolvency or bankruptcy", can never excuse contractual performance. *Venezolanos*, 740 F. Supp. at 267 (internal quotations omitted).[22]

Defendant concedes, as it must, that the SAFE Notice merely "delays" rather than prohibits the remittance of funds from the Joint Ventures to Traffic Stream. According to defendant's Chinese legal counsel, the SAFE Notice has "little material negative impact" on the remittance of Operating Income to Traffic Stream. *See* Jingtian Op., Ex. A to Zhao Decl., at 3. Indeed, on May 16, 1999, local Shandong authorities approved remittance to the Hong Kong Subsidiaries of the Operating Income for the Shandong Joint Ventures. *See* Wong Decl. ¶ 20. The SAFE Notice delayed that approval by only a few days. *See id.* ¶ 8. Similarly, the SAFE Notice does not preclude the remittance of Guaranteed Income. Rather, it requires that such remittance be approved by SAFE. *See* Jingtian Op., Ex. A to Reid Aff., at 3.

Of course, as set forth above, the practical effects of the SAFE Notice are legally irrelevant to defendant's impossibility defense. To use plaintiff's words: "The SAFE Notice is not a law or regulation that prohibits, delays or

---

22. From a common sense perspective, mere financial hardship can never support a claim of "objective" impossibility because it is caused by "subjective" factors unique to the financially distressed entity. In other words, although Traffic Stream itself did not have enough money to make payments under the Indenture, dozens of other companies with adequate financial resources could have easily made the required payments. Financial hardship means that the distressed individual is unable to make payments under a contract. It does not mean that the contract is incapable of being performed.

affects the legal ability of Traffic Stream, a British Virgin Islands corporation, from making the required payments, and therefore cannot excuse its failure to perform." Pl. Reply at 4. Put simply, Traffic Stream borrowed $119,000,000 from the United States markets based on its unconditional promise to pay. That Traffic Stream now claims it has no money, whatever the reason, cannot as a legal matter support a claim for objective impossibility. *See Stasyszyn*, 555 N.Y.S.2d at 299. Indeed, to excuse Traffic Stream's performance under these circumstances would open the floodgates and undermine our system of financial contracting.[23]

---

23. Defendant cites a number of cases to support its claim that the SAFE Notice renders Traffic Stream's performance under the Indenture impossible. However, all of the cases defendant cites are distinguishable from the instant case in that they involve government or judicial action that either directly restricted performance under a contract or substantially altered the terms of the contract. For example, in *Studio 54 Disco, Inc. v. Pee Dee Jay Amusement Corp.*, 439 N.Y.S.2d 395 (2d Dep't 1981), the court denied plaintiff's motion for summary judgment where defendant was unable to complete a required sale of property due to a judicial order explicitly restricting the sale of the property. In that case, neither defendant nor anyone else could perform under the contract due to the court order. Thus, performance was "objectively impossible."

In *Moyer v. City of Little Falls*, 510 N.Y.S.2d 813 (Sup. Ct. Herkimer Co. 1986), plaintiff entered into a five-year sanitation contract with the defendant city. The contract price was based on plaintiff's ability to dump refuse at a local landfill for $1.50/cubic yard. *See id.* at 814. Less than a year later, the state closed the local landfill creating a landfill monopoly. *See id.* The monopolist increased the dumping price by 666% within a one-year time period. *See id.* at 815. Because the terms of the contract were fundamentally altered,

(Cont'd)

b. Foreseeability

To succeed on an impossibility defense, not only must performance be objectively impossible, but "the impossibility must have been produced by an unanticipated event that could not have been foreseen or guarded against in the contract." *Kel Kim*, 70 N.Y.2d at 902. Because defendant cannot make a showing of objective impossibility, the Court need not reach this second prong. However, for the sake of thoroughness, I briefly address the issue.

Traffic Stream argues that it "did not foresee" the actions of the Chinese Government, nor could it "have reasonably contemplated them." Def. Opp. at 9. In support of its argument, Traffic Stream has submitted a declaration from Traffic Stream's Executive Director, Mr. Wong. In his declaration Mr. Wong states:

> The [Chinese] government has, during the recent years given high priority to the development of transportation infrastructure. . . . It is envisaged that more and more toll road projects in [China] will be funded by international financial institutions, foreign government loans, and various other sources of the global capital market.

(Cont'd)
the court held that plaintiff's performance was excused under the doctrine of impossibility. *See id.* Unlike the contract in *Moyer*, the terms of the Indenture have not changed. They are exactly the same now as they were when defendant entered into the agreement on May 6, 1998.

> Against this platform, [Traffic Stream] has never expected that the [Chinese] government would stage any new policies or regulations to the contrary, nor could it.
>
> The regulatory and policy changes in [China] were completely beyond [Traffic Stream's] control and were not within its reasonable anticipation.

Wong Decl. ¶¶ 27-29. Mr. Wong has also attached several newspaper articles discussing China's commitment to development of a transportation infrastructure through foreign investment. *See id.* at Ex. D.

As set forth *supra* Part IV.B.1.b., section 501 anticipates the possibility that government action might cause an event of default, and it assigns the risk of such government-induced default to defendant. Thus, pursuant to section 501, not only was the Chinese government's action foreseeable, it was foreseen and expressly provided for in the contract.

However, assuming arguendo that section 501 does not address adverse government action, the issue of whether the SAFE Notice could have been foreseen and guarded against is a question of fact. Although just barely, Mr. Wong's declaration and attachments raise an issue of fact that cannot be resolved on summary judgment.

That said, I find it highly implausible that sophisticated companies involved in foreign business ventures in China — business ventures that are intertwined with the State and local governments — "could not have foreseen the

possibility" that the Chinese Government might pass unfavorable foreign exchange or foreign investment regulations. Business ventures involving foreign governments and foreign corporations are always fraught with risk. However, business ventures in a communist state that is just warming to the foreign capital markets seems a particularly risky undertaking.

Moreover, despite China's announced commitment to foreign investment, there were signs of trouble well in advance of the parties' execution of the Indenture. Defendant's own expert references the 1997 Asian financial crisis stating: "I believe that the adoption of the [SAFE] Notice by the [Chinese Government] is in response to the 1997 Asian financial crisis and to strengthen the control on foreign exchange." Zhao Decl. ¶ 4.

* * * *

For the reasons set forth above, I find that defendant's impossibility defense is precluded by the plain language of section 501 of the Indenture. Moreover, I find that even absent the provisions of section 501, defendant has not made a sufficient legal showing of impossibility. Accordingly, plaintiff's motion for summary judgment is granted with respect to its claims for breach of contract and replevin of collateral (claims one and two).

V. Additional Claims

As set forth above, plaintiff also seeks summary judgment with respect to its claims for specific performance, an accounting and reasonable attorneys' fees.

A. Reporting Obligations

Plaintiff seeks specific performance of defendant's reporting obligations under section 1009 of the Indenture. As set forth above, the Indenture authorizes Chase to bring suit for "specific performance of any covenant or agreement in the Indenture." Indenture, Ex. A Reid Aff., § 503.

In its opposition, defendant concedes that it is "bound by its contractual obligations to provide Chase with the reports required by the Indenture." Def. Opp. at 25. Accordingly, plaintiff's motion for summary judgment is granted with respect to its claim for specific performance (claim three), and defendant is hereby directed to provide Chase with the required financial reports.

B. Accounting

In claim four of the complaint, plaintiff seeks an accounting. However, because plaintiff is entitled to specific performance of defendant's financial reporting obligations under section 1009 of the Indenture, including audited financial statements, *see supra* Part V.A; Indenture, Ex. A to Reid Aff., § 1009, plaintiff's additional request for an accounting is moot.

C. Collection Costs

Plaintiff seeks collection costs in the form of reasonable attorneys' fees pursuant to section 503 of the Indenture. *See* Pl. Mem. at 24. Section 503 requires defendant to pay the Trustee "such further amount as shall be sufficient to cover the costs and expenses of collection, *including*

the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel." Indenture, Ex. A to Reid Aff., § 503 (emphasis added).

Under New York law, "[r]easonable attorneys' fees are properly awarded when authorized by agreement." *Granada Condominium I v. Morris*, 639 N.Y.S.2d 91, 93 (2d Dep't 1996). Moreover, defendant does not oppose plaintiff's request for attorneys' fees. Therefore, plaintiff is entitled to reasonable attorneys' fees and should submit its request for such fees no later than February 18, 2000.

VI. Conclusion

For the foregoing reasons, plaintiff's motion for summary judgment is granted in its entirety.[24] Plaintiff is directed to foreclose on the Collateral Accounts and to submit a request for a deficiency judgment by February 18, 2000.

Defendant must provide the required financial reports to plaintiff by February 18, 2000. Once the Court sets reasonable attorneys' fees, the parties are directed to prepare a final judgment.

SO ORDERED:

s/ Shira A. Scheindlin
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
January 31, 2000

24. Plaintiff's motion is granted in its entirety with the exception that plaintiff's request for an accounting is denied as moot. *See supra* Part V.B.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 24, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of July two thousand one.

00-7721

THE CHASE MANHATTAN BANK, as Indenture Trustee, under the Indenture, dated as of May 6, 1998,

Plaintiff – Appellee,

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Defendant – Appellant.

Appendix D

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee The Chase Manhattan Bank.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has been requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

Supreme Court, U.S.
FILED
NOV 23 2001
OFFICE OF THE CLERK

(4)

No. 01-651

In the Supreme Court of the United States

CHASE MANHATTAN BANK, PETITIONER

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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19 pp

QUESTION PRESENTED

Whether corporations organized under the laws of United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of alienage diversity jurisdiction under 28 U.S.C. 1332(a)(2).

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In the Supreme Court of the United States

No. 01-651

CHASE MANHATTAN BANK, PETITIONER

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Article III of the Constitution extends the judicial power of the United States to controversies "between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." U.S. Const. Art. III, § 2, Cl. 1. Congress, in turn, has enacted the alienage diversity statute, which grants federal district courts jurisdiction over civil actions in which the matter in controversy exceeds $75,000, exclusive of interest and costs, and the action "is between * * * citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. 1332(a)(2). Congress enacted that statute to ensure, consistent with Article III, that private international disputes between United States citizens and foreign citizens or

subjects, involving substantial amounts in controversy, may be resolved in a federal judicial forum.

The United States has a substantial interest in the correct interpretation of the alienage diversity statute because that grant of jurisdiction facilitates international commerce and because misapplication of that statute can have significant foreign policy ramifications. The alienage diversity statute gives foreign nations assurance that civil actions between United States citizens and their citizens or subjects will be resolved in a neutral national forum. The construction of that statute by the Court of Appeals for the Second Circuit has led, however, to repeated and well-founded objections from an important ally and trading partner, the United Kingdom, that that court has improperly denied citizens and subjects of the United Kingdom access to an important federal forum for resolving international commercial disputes. The United States is keenly interested in ensuring that the alienage diversity statute is interpreted in a manner consistent with congressional intent. That interpretation also encourages foreign nations to afford United States citizens reciprocal access to foreign courts.

STATEMENT

Petitioner Chase Manhattan Bank sued respondent in the United States District Court for the Southern District of New York for breach of an indenture agreement providing for the issuance of secured debt to finance respondent's business ventures. See Pet. App. 15a-16a. The district court granted summary judgment in favor of petitioner, allowed foreclosure on collateral valued at more than $49 million, and entered a deficiency judgment in the amount of more than $98 million. See *id.* at 8a, 13a, 15a-16a, 54a. The court of appeals

reversed that decision and ordered the district court to dismiss the action for lack of subject matter jurisdiction in light of the court of appeals' prior decision in *Matimak Trading Co.* v. *Khalily*, 118 F.3d 76 (2d Cir. 1997), cert. denied, 522 U.S. 1091 (1998). Pet. App. 1a-7a. The court of appeals concluded that the district court improperly exercised jurisdiction under the alienage diversity statute, 28 U.S.C. 1332(a)(2), because respondent, which is a corporation organized under the laws of a United Kingdom Overseas Territory, is not, in the court's view, a "citizen[] or subject[] of a foreign state." Pet. App. 7a.[1]

1. Petitioner is a United States bank, incorporated under the laws of the State of New York, that engages in domestic and international financing. Respondent is a foreign corporation organized under the laws of the British Virgin Islands. Petitioner and respondent entered into an indenture under which respondent issued notes, secured by collateral, in the aggregate amount of $119,000,000. The notes were issued to finance the activities of respondent's four Hong Kong subsidiaries, which engage in joint ventures for road construction projects in China. Respondent agreed to make regular repayments on the notes to petitioner. It also agreed

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[1] The United Kingdom Overseas Territories consist of Anguilla, Bermuda, British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, the Pitcairn Islands, Saint Helena and dependencies, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands. Pet. 6 n.2; British Nationality Act 1981, 31 Halsbury's Statutes 127, Sched. 6. Prior to 1998, the United Kingdom referred to the Overseas Territories as "Dependent Territories," but there is "no practical difference" between those terms. Pet. App. 6a n.1. Until its July 1, 1997, reversion to China, Hong Kong was a Dependent Territory.

that the indenture was governed by the laws of New York and that it would submit "to the jurisdiction of any court of the State of New York or any United States federal court sitting in the Borough of Manhattan, New York City, New York." Pet. App. 2a-3a, 15a-18a; see Pet. 3.

When respondent defaulted on its payments, petitioner brought this action in the United States District Court for the Southern District of New York to obtain immediate repayment of respondent's indebtedness, including both principal and interest. The district court granted petitioner's motion for summary judgment in its entirety. Pet. App. 15a-54a. That court determined at the outset, and without objection from respondent, that it possessed subject matter jurisdiction by virtue of the alienage diversity statute, 28 U.S.C. 1332(a)(2), "because [petitioner] is a corporate citizen of New York, [respondent] is a corporate citizen of the British Virgin Islands and the matter in controversy exceeds $75,000." Pet. App. 17a. The court then rejected respondent's "impossibility" defense, *id.* at 36a-52a, and authorized petitioner to foreclose on collateral accounts totaling $49,054,290.84, *id.* at 8a-9a, 54a. The court later issued an order directing entry of a deficiency judgment in the amount of $98,388,352.74. *Id.* 8a-14a.

2. On respondent's appeal, the court of appeals sua sponte raised the question whether the district court possessed subject matter jurisdiction under the alienage diversity statute. Following supplemental briefing, the court of appeals ruled that the district court lacked jurisdiction because corporations organized under the laws of United Kingdom Overseas Territories do not qualify as "citizens or subjects of a foreign state" (28 U.S.C. 1332(a)(2)). Pet. App. 1a-7a. The court observed that it had addressed the application of

the alienage diversity statute to United Kingdom Overseas Territories (which were then called Dependent Territories, see note 1, *supra*) in *Matimak Trading Co.*, *supra*.

In *Matimak*, a corporation incorporated in Hong Kong, which was then a Dependent Territory, invoked a federal district court's alienage diversity jurisdiction prior to Hong Kong's 1997 reversion to China. The court of appeals ruled that, because "the United States does not regard Hong Kong as an independent, sovereign political entity," the corporation did not qualify as a "citizen[] or subject[] of a foreign state." Pet. App. 5a; *Matimak*, 118 F. 3d at 82. Furthermore, the court ruled that, because the corporation was not a citizen or subject of the United Kingdom under British law, the corporation was "stateless" and "c[ould not] sue a United States citizen under alienage jurisdiction." Pet. App. 5a; *Matimak*, 118 F.3d at 85, 86. The court of appeals adhered to the reasoning of *Matimak* in *Koehler* v. *Bank of Bermuda (New York) Ltd.*, 209 F.3d 130, amended, 229 F.3d 424, rehearing en banc denied, 229 F.3d 187 (2d Cir. 2000) (Bermuda corporation and citizen), and *Universal Reinsurance Co.* v. *St. Paul Fire & Marine Ins. Co.*, 224 F.3d 139 (2d Cir. 2000) (Bermuda corporation).

In this case, the court of appeals noted, respondent is a corporation created under the laws of the British Virgin Islands, and "[t]he British Virgin Islands is a British Dependent Territory, as Hong Kong was at the time of *Matimak* and Bermuda was at the time of *Koehler* and *Universal Reinsurance*." Pet. App. 6a. Finding that "[n]othing relevant to the alienage jurisdiction inquiry has changed since we decided those appeals," the court of appeals concluded that "[w]e are bound to hold that [respondent] is not a citizen or subject of a foreign

state and that the district court therefore had no alienage jurisdiction over this action under § 1332(a)(2)." *Id.* at 6a-7a. Finding no other basis for jurisdiction, the court of appeals reversed the judgment and remanded the case to the district court with instructions to dismiss the complaint. *Id.* at 7a. The court of appeals later denied a petition for rehearing en banc. *Id.* at 55a-56a.

ARGUMENT

The decision of the court of appeals in this case plainly warrants this Court's review. The question of how the alienage diversity statute applies to companies incorporated in a foreign nation's territories presents an issue of substantial and recurring commercial importance as well as a matter of foreign relations significance. That question has produced a square conflict among the courts of appeals. Furthermore, the court of appeals that decided this case—which alone holds the view that those companies are "stateless" and which is a forum for a substantial amount of important commercial litigation—has made clear that it intends to adhere to its broadly criticized ruling. Additionally, the court of appeals' decision is wrong. That decision rejects the traditional and plain meaning of the term "citizens or subjects of a foreign state" and thwarts Congress's purpose by imposing an arbitrary and unwarranted limitation on the scope of its jurisdictional grant. The decision is not only contrary to the views of other courts of appeals, but also to the position of the United States, the United Kingdom, and numerous academic commentators regarding the relationship of the United Kingdom to its Overseas Territories and the application of the alienage diversity statute to companies incorporated in those territories.

1. The Constitution provides that the the "judicial Power" of the United States shall extend to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. Art. III, § 2, Cl. 1. The Framers included that provision to enable Congress to provide a neutral federal forum for lawsuits involving foreign citizens and subjects, in addition to the judicial fora provided by the individual States. See *The Federalist No. 80*, at 406-407 (Alexander Hamilton) (Beloff ed., 1987).[2]

Congress effectuated Article III's establishment of alienage diversity jurisdiction through the Judiciary Act of 1789, under which the federal courts were first organized. The Judiciary Act stated that the federal courts "shall have original cognizance, * * * of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * * an alien is a party." Ch. 20, 1 Stat. 78. In 1875, Congress amended that provision to conform the language of the statute to the language of the Constitution. See Act of Mar. 3, 1875, ch. 137, 18 Stat. (Pt. 3) 470 (federal jurisdiction over suits "between citizens of a State and foreign states, citizens, or subjects"). Congress amended that language to its present form in the 1948 recodification of the Judicial Code, ch. 646, 62 Stat. 930 (§ 1332(a)(2)), as amended by the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 1330, 90 Stat. 2891.

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[2] See generally 15 J. Moore, *Moore's Federal Practice* § 102.73 (1999); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations And Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 10-16, 30-52 (1996); see also Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1927-1928).

Since its introduction in 1789, the alienage diversity statute has assumed international importance. The United States is now the focus of a tremendous volume of international commerce, and the alienage diversity statute is regularly invoked, as it was in this case, to provide for resolution of commercial disputes involving many millions of dollars. See Pet. App. 15a-17a. Indeed, sophisticated commercial parties regularly include forum selection clauses in their international contracts in reliance on the alienage diversity statute's provision of a neutral federal forum for resolution of their disputes. See Pet. 3-4; C.A. App. 58; see generally *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991) (discussing the enforcability of forum selection clauses); *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (same).

The particular issue here—whether corporations incorporated in the United Kingdom's Overseas Territories are "citizens or subjects of a foreign state"—is, in itself, a question of substantial commercial importance. The United Kingdom has represented to the United States and its courts that there are many thousands of banking, insurance, and business companies within its Overseas Territories, see Pet. 17-18 n.10, and those companies regularly transact business with citizens of the United States. As this case illustrates, those transactions can involve many millions of dollars. Pet. App. 15a-16a. Petitioner notes that questions respecting the jurisdictional status of those entities have arisen no less than nine times within the Second Circuit alone since that court's *Matimak* decision. See Pet. 22-23 n.11. There is accordingly a strong commercial need for a definitive determination whether corporations created within such territories are subject to the alienage diversity statute.

The issue is also important in light of its foreign relations ramifications. The United Kingdom has repeatedly expressed its position to the United States, through diplomatic channels and through briefs amicus curiae, that citizens and corporations of its Overseas Territories are citizens or subjects of the United Kingdom for purposes of the alienage diversity statute. See Pet. 14-16. The United States has joined the United Kingdom in objecting to the court of appeals' reasoning through its own amicus filings in the courts of appeals. *Ibid.* Thus, the two nations with the most direct interest in the outcome of this case—the United States and the United Kingdom—agree that the court of appeals' decision presents an issue of substantial practical importance warranting this Court's review.[3]

2. The court of appeals' decision also warrants review because the court's interpretation of the alienage diversity statute has generated a square conflict among the courts of appeals. As noted above, the Second Circuit has ruled on four occasions that residents of and companies incorporated in the United Kingdom Overseas Territories are not "citizens or subjects" of the United Kingdom. See Pet. App. 1a-7a (British Virgin Islands); *Universal Reinsurance Co.*, 224 F.3d at 140-

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[3] Other countries, besides the United Kingdom, have overseas territories that are potentially subject to the court of appeals' ruling, including France, the Netherlands, Australia, New Zealand, Denmark, and Norway. The federal district courts within the Second Circuit have indicated that they will apply the court of appeals' reasoning in *Matimak* to at least some of those territories. See *Inarco Int'l Bank, N.V.* v. *Lazard Freres & Co.*, No. 97 Civ. 0378 (DAB), 1998 WL 427618 (S.D.N.Y. July 29, 1998) (suggesting in dicta that a bank incorporated in Aruba, a Netherlands dependency, may not be allowed to invoke alienage diversity jurisdiction, citing *Matimak*).

141 (Bermuda corporation); *Koehler*, 209 F.3d at 139 (Bermuda corporation and citizen); *Matimak*, 118 F.3d at 85-88 (pre-reversion Hong Kong corporation). The Third, Fourth, and Seventh Circuits have ruled that residents and companies incorporated in those territories are citizens or subjects of the United Kingdom for purposes of the alienage diversity statute. See *Southern Cross Overseas Agencies, Inc.* v. *Wah Kwong Shipping Group Ltd.*, 181 F.3d 410 412-413 (3d-Cir. 1999) (pre-reversion Hong Kong corporation); *Koehler* v. *Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998) (Bermuda resident); *Wilson* v. *Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-1243 (7th Cir. 1990), cert. denied, 499 U.S. 947 (1991) (Cayman Island corporation).

The division among the courts of appeals is express and irreconcilable. The Third Circuit specifically considered and explicitly "disagree[d]" with the Second Circuit's analysis in *Matimak*. See *Southern Cross*, 181 F.3d at 413, 415-419. The Third Circuit noted that historically, there was no such thing as a "stateless" person or corporation, and the Framers of the Constitution "apparently considered the class of 'subjects or citizens of a foreign state' as identical with the class of 'aliens.'" *Id.* at 415-416 (citation omitted). The court evaluated and rejected the *Matimak* court's presumption that a person or entity that is not a British "citizen" could not be a British "subject" for purposes of the alienage diversity statute. *Id.* at 417-418. The court ultimately deferred to the position of the United States and concluded that pre-reversion Hong Kong corporations were "subjects of the United Kingdom for alienage diversity purposes." *Ibid.*

Faced with the Third Circuit's conflicting decision, the Second Circuit, over a strong dissent, has adhered

to its holding in *Matimak*. See *Koehler*, 229 F.3d at 187 (denying petition for rehearing en banc). In her dissenting opinion, Judge Sotomayor, joined by Judge Leval, observed:

> Because [the Second Circuit] panel decisions have caused a clear split in authority with the other circuit courts, and in light of the potential damage to relations between the United States and the United Kingdom and other nations, it can only be hoped that the Supreme Court chooses to address the resolution of this issue expeditiously.

Id. at 193-194 (Sotomayor, J. dissenting from denial of rehearing en banc). See also *id.* at 194 (Calabresi, J., dissenting separately); 229 F.3d at 424-425 (amending the panel decision to reflect that Judges Cardamone and Newman "feel constrained by the precedential force of *Matimak*" and that "[w]ere the question open in this Circuit, both would rule that citizens of Bermuda and other British Dependent Territories are sufficiently subject to the sovereignty of the United Kingdom to satisfy the alienage clause of the diversity statute"); Pet. App. 6a-7a & n.2 (noting the denial of rehearing en banc in *Koehler*).

In short, the courts of appeals are squarely divided on the issue, and that disagreement on a fundamental question of federal court jurisdiction will persist until this Court grants review.

3. The court of appeals' decision additionally warrants review because it is wrong. Judge Sotomayor's dissent from the denial of rehearing en banc in *Koehler* summarizes the defects in the court of appeals' reasoning. See 229 F.3d at 190-193.

The question whether persons or corporations fall within the scope of the alienage diversity statute is, of

course, an issue of federal law. It depends on "whether United States law deems such persons or entities to be 'citizens or subjects' under our Constitution and statutes for the purpose of alienage jurisdiction." *Koehler*, 229 F.3d at 190 (Sotomayor, J., dissenting). "As an historical matter, the drafters of the Constitution chose the words 'citizens' or 'subjects' to refer to the broad category of those under the authority of a foreign power." *Id.* at 191.[4] Consistent with the traditional and common meaning of those terms, the alienage diversity statute extends federal court jurisdiction to all persons and corporations who are under the authority of a foreign state. See *id.* at 191-192.[5] The Constitution of the

[4] The dissent noted that in *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), Chief Justice Marshall equated Article III's reference to "Citizens or Subjects" of a foreign state with "aliens." Likewise, the drafters of the Judiciary Act of 1789 treated the Article III terms as synonymous with "aliens" and "foreigners." See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78; 1 Annals of Cong. 810, 814, 825 (Joseph Gales ed., 1789) (House debates); see also Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 60 (1932).

[5] See *Steamship Co.* v. *Tugman*, 106 U.S. 118, 121 (1882) ("a corporation created by the laws of a foreign State may, for the purposes of suing and being sued in the courts of the Union, be treated as a 'citizen' or 'subject' of such foreign State' "); see also *The Pizarro*, 15 U.S. (2 Wheat.) 227, 245-246 (1817); *Inglis* v. *Trustees of Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting); see generally *Oxford English Dictionary* (1977)(defining a "subject" as "[o]ne who is under the dominion of a monarch or reigning prince; one who owes allegiance to a government or ruling power, is subject to its laws, and enjoys its protection"); Noah Webster, *American Dictionary of the English Language* (1828) (defining a "subject" as "[o]ne that owes allegiance to a sovereign and is governed by his laws"); Samuel

British Virgin Islands expressly recognizes the United Kingdom's continuing sovereignty and dominion over that Overseas Territory. See, *e.g.*, Virgin Islands (Constitution) Order 1976, §§ 3-6, 13, 25, 34, 42-43, 71.[6] Because the citizens and corporations of the British Virgin Islands, like citizens and corporations of Bermuda, "live under the sovereignty of the United Kingdom," they "are 'citizens or subjects' of the United Kingdom for purposes of alienage jurisdiction." *Koehler*, 229 F.3d at 193 (Sotomayor, J., dissenting).

The United States and the United Kingdom, as well as numerous academic commentators, have argued that the Second Circuit's construction of the alienage diversity statute is fundamentally unsound.[7] That important jurisdictional issue is now squarely before this Court.

Johnson, *A Dictionary of the English Language* (1755) (defining a "subject" as "[o]ne who lives under the dominion of another").

[6] The British Virgin Islands (Constitution) Order 1976 is reprinted in Constitutions of Dependencies And Special Sovereignties (Blaustein ed., 1997), and at the following websites: *http://www.gis.gov.vg/GenInfoC/TheLaw/Constitution.htm* and *http://www.viparty.com/constitution/constitution.htm*.

[7] *See, e.g.*, Jonathan Schafter, *Original Intentions and International Reality: States, Sovereignty, and the Misinterpretation of Alienage Jurisdiction in* Matimak *v.* Khalily, 39 Colum. J. Transnat'l L. 729 (2001); Frank Eric Marchetti, *Alienage Jurisdiction Over Stateless Corporations: Revealing the Folly of* Matimak Trading Company *v.* Khalily, 36 San Diego L. Rev. 249 (1999); Jennifer L. Coviello, *Access Denied: A Case Comment on* Matimak Trading Co. *v.* Khalily, 18 N.Y.L. Sch. J. Int'l & Comp. L. 435 (1999); Mark Baker, *Lost in the Judicial Wilderness: The Stateless Corporation after Matimak Trading*, 19 Nw. J. Int'l L. & Bus. 130 (1998); Teresa M. Mozina, *Why Is There Any Question? Hong Kong and Alienage Jurisdiction: A Critical Analysis of* Matimak Trading Co. *v.* Khalily and D.A.Y., 10 Pace Int'l L. Rev. 575 (1998).

The Court should resolve the conflict among the courts of appeals and restore the opportunity that Congress has provided for the full range of "citizens or subjects" of foreign states to adjudicate their claims and defenses in a federal forum.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 01-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

THE CHASE MANHATTAN BANK, AS INDENTURE TRUSTEE, UNDER THE INDENTURE, DATED AS OF MAY 6, 1998,
Petitioner,

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE and BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to this Court's Rule 37, the Government of the United Kingdom of Great Britain and Northern Ireland, through its undersigned counsel, hereby respectfully moves for leave to file the following brief *amicus curiae* in support of the petition for certiorari in this case. Petitioner has consented to the United Kingdom's filing its brief, and a letter reflecting that consent is being filed with the Clerk of the Court. Respondent has withheld its consent, thus necessitating the filing of this motion.

The United Kingdom seeks leave to file its brief *amicus curiae* because it has a substantial interest in expressing its views to the Court regarding the need to correct the decision of the court below. The question before this Court – whether corporations formed under the laws of the United Kingdom Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of alienage diversity jurisdiction – directly implicates how the United Kingdom, under its own laws, views the nationality of such corporations. The United Kingdom is particularly concerned in this regard because the decision below followed a prior Second Circuit decision that misinterpreted United Kingdom law.

The United Kingdom also is concerned that the decision below may jeopardize current and future commercial dealings between corporations of its Overseas Territories and American companies. Denying Overseas Territories corporations access to United States federal courts undermines countless transactions that rely on federal jurisdiction to provide stability and certainty in

the event problems arise regarding those transactions. The resulting uncertainty may lead to fewer business opportunities between American and Overseas Territories corporations and a consequent economic impact that may be measured in the billions of dollars.

For these reasons, the Government of the United Kingdom of Great Britain and Northern Ireland respectfully requests that this Court grant it leave to file the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether corporations organized under the laws of the British Virgin Islands and other United Kingdom Overseas Territories qualify as "citizens or subjects of a foreign state" under the federal alienage diversity jurisdiction statute, 28 U.S.C. § 1332(a)(2).

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IN THE

Supreme Court of the United States

OCTOBER TERM 2001

No. 01-651

THE CHASE MANHATTAN BANK, AS INDENTURE TRUSTEE, UNDER THE INDENTURE, DATED AS OF MAY 6, 1998,
Petitioner,

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Government of the United Kingdom of Great Britain and Northern Ireland submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed on behalf of the Chase Manhattan Bank.[1]

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the United Kingdom or its counsel has made a monetary contribution to the brief's preparation and submission.

INTEREST OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The United Kingdom has a substantial interest in expressing its views to the Court regarding the need to correct the decision of the court below. The question before the Court – whether corporations formed under the laws of the United Kingdom Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of alienage diversity jurisdiction – directly implicates how the United Kingdom, under its own laws, views the nationality of such corporations.[2] The United Kingdom has a special interest in participating in this matter because the decision below perpetuated a prior misinterpretation of United Kingdom law by the same court in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998).

The United Kingdom also is concerned that the decision below, if permitted to stand, will result in hundreds of thousands of Overseas Territories corporations – all of which the United Kingdom considers its subjects – being denied access to the jurisdiction of United States federal courts. Placing those corporations beyond the reach of federal jurisdiction – particularly in New York, the commercial center in the United States for international transactions – jeopardizes the stability of commercial dealings between

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[2] The "United Kingdom," in the community of sovereign states, includes the United Kingdom Overseas Territories and the Crown Dependencies. The Overseas Territories include: Anguilla, Bermuda, the British Antarctic Territory, the British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the Sovereign Base Areas in Cyprus, the Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena and dependencies, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands. The Crown Dependencies consist of the Channel Islands and the Isle of Man.

those corporations and their American trading partners. It places at risk billions of dollars of existing financial commitments of such parties, and threatens the viability of future investment and commerce. This, in turn, could damage the commercial relations between the United States and the United Kingdom on a more global scale.

Her Majesty's Government expressed its concern about this issue in a recent Diplomatic Note requesting assistance from the United States Department of State in obtaining a reversal of *Matimak*. That Diplomatic Note sets forth the United Kingdom's position in unmistakable terms:

> The United Kingdom wishes to restate its position that corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom. The United Kingdom is therefore of the view that such corporations ought to be amenable to the alienage jurisdiction of United States Federal Courts under 28 U.S.C. § 1332(a)(2), whether as plaintiffs or defendants. Court decisions which fail to recognise such jurisdiction may have a serious detrimental effect on the trading relationship between the United States and the United Kingdom Overseas Territories.
>
> * * * * *
>
> In view of the proliferation of Second Circuit decisions enforcing the holding in *Matimak*, the United Kingdom considers it essential that the Supreme Court take this opportunity to remove the ensuing legal uncertainty concerning the transactions of corporations of United Kingdom Overseas Territories.

App. 1a-2a (Diplomatic Note No. 90/2001 (Oct. 5, 2001)).

BACKGROUND

As this Court explained more than 100 years ago in *United States v. Wong Kim Ark*, "it is the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to its citizenship." 169 U.S. 649, 668 (1898). Both courts and commentators have recognized this fundamental principle. *See, e.g., Murarka v. Bachrack Bros., Inc.*, 215 F.2d 547, 553 (2d Cir. 1954) ("It is the undoubted right of each country to determine who are its nationals, and it seems to be general international usage that such a determination will usually be accepted by other nations."); 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3604, at 393 (2d ed. 1984) ("Of course, each nation has the absolute right to decide who is entitled to its citizenship.") (*citing Wong Kim Ark*, 169 U.S. at 668). Thus, "[t]he generally accepted test for determining whether a person is a foreign citizen for purposes of 28 U.S.C. § 1332(a)(2) is whether the country in which citizenship is claimed would so recognize him." *Sadat v. Mertes*, 615 F.2d 1176, 1183 (7th Cir. 1980).

Federal courts, therefore, look consistently to the law of the country whose citizenship is claimed when determining the existence of alienage diversity jurisdiction. In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278, 285 (7th Cir. 1990), for example, the Seventh Circuit held that the Church of Cyprus met the requirements for alienage diversity jurisdiction because it was a "distinct juridical entity" under Cypriot law. The court of appeals rejected the argument that the Church was not a "corporation" within the American legal definition of the term, emphasizing that Cypriot law controlled the issue, and that "under the laws of the Republic of Cyprus, the Church is considered a juridical

entity distinct from its members." *Id.* Similarly, in *Cohn v. Rosenfeld*, 733 F.2d 625, 629 (9th Cir. 1984), the Ninth Circuit looked to Liechtenstein law when holding that alienage diversity jurisdiction extended to a Liechtenstein limited liability company known as an *anstalt*:

> Section 1332(a)(2) applies to foreign legal entities of all kinds, so long as the entity is considered a juridical person under the law that created it. . . . We have no doubt that Liechtenstein regards *anstalts* as juridical persons under its laws.

Id. Cf. Puerto Rico v. Russell & Co., 288 U.S. 476, 481 (1933) (looking to the law of Puerto Rico to determine that a Puerto Rican business entity known as a *sociedad en comandita* is a "juridicial person" for purposes of federal jurisdiction). Even the Second Circuit in *Matimak* recognized "the truism that a foreign state is entitled to define who are its citizens or subjects" when it attempted to interpret United Kingdom law with regard to the alienage jurisdiction issue in that case. 118 F.3d at 85.

In *Matimak*, however, the Second Circuit misinterpreted United Kingdom law and erroneously concluded that Hong Kong corporations were "stateless" entities not covered by the alienage jurisdiction statute. 118 F.3d at 86. That holding clashes directly with the United Kingdom's official position that Overseas Territories corporations are United Kingdom "subjects" within the meaning of 28 U.S.C. § 1332(a)(2).

The Second Circuit did not have the benefit of the United Kingdom's views on this matter when it decided *Matimak*. *See Favour Mind Ltd. v. Pacific Shores, Inc.*, No. 98-Civ-7038(SAS), 1999 U.S. Dist. LEXIS 18887, at *16 (S.D.N.Y. Dec. 7, 1999) ("[In *Matimak*,] the Second Circuit had before it no affirmative evidence that the government of Great Britain considered Hong Kong corporations to be British citizens."). But since that decision, Her Majesty's

Government has submitted its views on several occasions, seeking to facilitate correction of the court of appeals' error. These efforts include the filing of an *amicus curiae* brief in support of the petition for certiorari in *Matimak* itself, as well as several *amicus* submissions addressing the alienage jurisdiction question in subsequent cases involving Overseas Territories.

In February 2000, for example, the United Kingdom filed an *amicus curiae* brief in the Second Circuit in support of the appellee in *III Finance Ltd. v. Aegis Consumer Finance, Inc.*, No. 00-7016 (2d Cir. 2000), a case that involved alienage jurisdiction over a Cayman Islands corporation. That *amicus* submission set forth the United Kingdom's position that Overseas Territories corporations are United Kingdom "subjects" and thus should be allowed access to United States federal courts under 28 U.S.C. § 1332(a)(2). Specifically, the United Kingdom explained, *inter alia*, that:

- The United Kingdom's Rules Applying to International Claims, contained in the United Kingdom Government's Diplomatic Service Procedure Manual, define the term "United Kingdom national" to encompass "[c]ompanies incorporated under the law of the United Kingdom or of any territory for which the United Kingdom is internationally responsible;"

- The Companies Act 1948, on which the *Matimak* panel relied, and the subsequent Companies Act 1985, do not limit the United Kingdom from extending its sovereignty to corporations organized under the laws of the Overseas Territories;

- The *Matimak* panel relied on an inapposite statute when it looked to the British Nationality Act 1981 because, as the *Matimak* court admitted, that statute

applies only to natural persons and not corporations; and

- *Matimak* conflicts with Art. 2, Sec. (4) of the Consular Convention between the United States and the United Kingdom, June 6, 1951, 3 U.S.T. 3426, which defines United Kingdom "nationals" to include "all citizens of the United Kingdom and colonies, . . . and all British protected persons belonging to territories of His Majesty to which the Convention applies, including, where the context permits, all juridical entities duly created under the law of any of those territories."

No. 00-7016 (2d Cir. 2000), *amicus* brief at 6-7, 10-17.

The United Kingdom also attached to its brief in *III Finance* an earlier Diplomatic Note to the United States Government expressing its concerns. That Diplomatic Note, like the current one, expressly set forth the United Kingdom's official view "that corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom." Diplomatic Note No. 13/2000 (Feb. 2, 2000). The parties in *III Finance* settled their case before the court of appeals could revisit its prior ruling in *Matimak* on alienage jurisdiction over claims involving Overseas Territories corporations. Also in February 2000, the United Kingdom filed a similar *amicus curiae* brief in the Fifth Circuit in *ART 57 Properties, Inc. v. 57 BB Property, L.L.C.*, No. 99-10385 (5th Cir. 2000). Like the Second Circuit in *III Finance*, however, the Fifth Circuit never reached the alienage jurisdiction issue, as the parties in *ART 57* stipulated to the withdrawal of alienage jurisdiction as an issue in the appeal.

The United Kingdom's position in *III Finance* also was presented to the entire Second Circuit in submissions by the parties regarding a petition for rehearing *en banc* in *Koehler v. Bank of Bermuda (New York) Ltd.*, another decision

denying alienage jurisdiction over an Overseas Territory corporation. 209 F.3d 130 (2d Cir.), *amended*, 229 F.3d 424 (2d Cir.), *reh'g en banc denied*, 229 F.3d 187 (2d Cir. 2000). Relying in large part on the United Kingdom's position and arguments, three judges of the court of appeals dissented from the denial of that petition, and indicated that they would reverse *Matimak*. *Koehler*, 229 F.3d 187 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing *en banc*); *id.* at 194 (Calabresi, J., dissenting from denial of rehearing *en banc*). Indeed, two of those judges expressly requested review of the alienage jurisdiction issue by this Court:

> Because [the *Matimak* and *Koehler*] panel decisions have caused a clear split in authority with the other circuit courts, and in light of the potential damage to relations between the United States and the United Kingdom and other nations, it can only be hoped that the Supreme Court chooses to address the resolution of this issue expeditiously.

Id. at 193-94 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing *en banc*). In addition, two of the three judges on the *Koehler* panel – Judges Cardamone and Newman – stated that "[w]ere the question open in this Circuit, [they] would rule that citizens of Bermuda and other British Dependent Territories are sufficiently subject to the sovereignty of the United Kingdom to satisfy the alienage clause of the diversity statute . . . ." *Koehler*, 229 F.3d at 424. Because of the Second Circuit's prior holding in *Matimak*, however, they felt "constrained" to hold that jurisdiction was lacking. *Id.*

Counsel for petitioner in this case resubmitted to the Second Circuit the views and materials that the United Kingdom had presented in *III Finance*. The panel below, however, followed *Matimak* and dismissed the case for lack of alienage jurisdiction. The panel did not conduct its own

analysis of the merits. Rather, it simply quoted from the court's prior decisions in *Matimak, Koehler, and Universal Reinsurance Co. v. St. Paul Fire & Marine Insurance Co.*, 224 F.3d 139 (2d Cir. 2000), and concluded that it was "bound to hold" that alienage jurisdiction did not exist. Pet. App. 7a.

ARGUMENT

The decision below directly affects the commercial interests of countless American companies and their Overseas Territories trading partners, threatens a "foreign entanglement" with one of the United States' closest allies, and implicates fundamental principles of international comity.

The Second Circuit's denial of alienage jurisdiction in cases involving Overseas Territories corporations undermines the stability afforded by federal forum-selection clauses relied on by American and Overseas Territories companies. The resulting uncertainty will lead to fewer business opportunities between such entities, thereby conflicting with the fundamental purposes of alienage jurisdiction and threatening an economic impact that may be measured in the billions of dollars.

In addition, the Second Circuit's decisions in this area ignore the United Kingdom's views about the citizenship of its own subjects, and thus grant no deference to the United Kingdom's statements regarding the reach of its own sovereign law. The United Kingdom's official position, as expressed in its rules, treaties, two Diplomatic Notes, and numerous submissions to United States courts, is that corporations of its Overseas Territories are United Kingdom "subjects" for purposes of alienage jurisdiction. This determination deserves deference under fundamental principles of international comity, particularly considering

that United Kingdom courts are open to corporations of United States territories. Yet the panel below essentially disregarded the United Kingdom's view, and thus created just the sort of "foreign entanglement" that alienage jurisdiction was designed to avoid.

I. THE SECOND CIRCUIT'S DENIAL OF ALIENAGE JURISDICTION IN CASES INVOLVING OVERSEAS TERRITORIES CORPORATIONS THREATENS SIGNIFICANT HARM TO UNITED STATES AND UNITED KINGDOM COMMERCIAL INTERESTS THAT EXTENDS FAR BEYOND THIS CASE.

The Second Circuit's decisions in *Matimak* and the case at bar will harm the interests of hundreds of thousands of corporations formed in the United Kingdom Overseas Territories, as well as the countless American companies and individuals that transact business with them on a daily basis. Almost 500,000 international business companies have been incorporated in the British Virgin Islands since 1984. *See* AMS GROUP OFFSHORE NEWSLETTER (2000): "BRITISH VIRGIN ISLANDS: MORE THAN JUST IBC'S," *available at* http://www.amsbvi.com/I49BVImorethanibcs.htm (last visited Nov. 15, 2001). Similarly, the Cayman Islands, another United Kingdom Overseas Territory and home to more than 40,000 companies, is "the fifth largest financial center in the world." *See* THE WORLD FACTBOOK 2001: CAYMAN ISLANDS, *available at* http://www.cia.gov/cia/publications/factbook/geos/cj.html (last visited Nov. 15, 2001).

The denial of federal alienage jurisdiction in cases involving such parties will have a substantial economic impact on commerce between the United States and the Overseas Territories, and more generally on bilateral investment and commerce between the United States and

United Kingdom. In 2000 alone, for example, United States exports to the British Virgin Islands, the Cayman Islands, and Bermuda totaled $64.6 million, $354 million, and $428 million, respectively; imports into the United States from those same Overseas Territories totaled $30.9 million, $6.5 million, and $39 million, respectively, in the same year. *See* U.S. CENSUS BUREAU, STATISTICS, (2000) at http://www.census. gov/foreign-trade/sitcl/2000.htm (last visited Nov. 15, 2001). The United Kingdom (including the Overseas Territories) is the largest source of foreign investment in the United States, and one of this nation's largest trading partners. *See* U.S. CENSUS BUREAU FOREIGN TRADE STATISTICS (2000): "TOP TEN COUNTRIES WITH WHICH THE U.S. TRADES," *available at* http:/www.census.gov/foreigntrade/top/dst/2000/12/balance/html (last visited Nov. 19, 2001); UNITED STATES EMBASSY, TOKYO: "FOREIGN DIRECT INVESTMENT IN U.S. INCREASES 17 PERCENT IN 2000," *available at* http://usembassy.state.gov/tokyo/www.heco111.html (last visited Nov. 19, 2001).

Access to federal courts provides stability and certainty for such transactions between American and Overseas Territories entities. It is critical for Overseas Territories corporations to know, when considering transactions with an American company, that they will be able to seek redress in federal court if problems arise with those transactions. Many United Kingdom Overseas Territories corporations will be less willing to do business in the United States due to the uncertainty created by the Second Circuit's decisions.[3] That, in turn, will hamper the ability of American companies to conduct business with Overseas Territories companies. The Second Circuit's ruling thus needlessly frustrates legitimate

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[3] As explained in Petitioner's brief, *Matimak* conflicts with several other courts of appeals decisions holding that alienage jurisdiction extends to Overseas Territories corporations. *See* Petition at 9-11.

business interests on a massive scale. This problem is especially acute because New York is the traditional financial center of the United States, and many commercial contracts between such parties call for a forum in New York.

Denying Overseas Territories corporations access to United States federal courts thus conflicts directly with one of the basic purposes of alienage jurisdiction: the promotion of foreign investment and trade with the United States.

> Alienage jurisdiction was established . . . to strengthen our relations – particularly our commercial relations – with foreign nations. The importance of these goals has only increased with time as both international relations and global trade have become more complex and our nation has assumed a central role in both.

Koehler, 229 F.3d at 193 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing *en banc*). The decision below threatens ongoing harm to the financial and investment activities between citizens of the United States and subjects of the United Kingdom. To avoid that unnecessary result, this Court should grant *certiorari*, correct the Second Circuit's misreading of United Kingdom law, and reverse the lower court's decision.

II. THE SECOND CIRCUIT'S DENIAL OF ALIENAGE JURISDICTION OVER OVERSEAS TERRITORIES CORPORATIONS HAS CREATED THE VERY SORT OF "FOREIGN ENTANGLEMENT" THAT ALIENAGE JURISDICTION WAS DESIGNED TO AVOID.

"The *raison d'être* of alienage jurisdiction is to avoid 'entanglements with other sovereigns that might ensue from failure to treat the legal controversies of aliens on a national level.'" *Matimak*, 118 F.3d at 82 (*quoting Iran Handicraft & Carpet Exp. Ctr. v. Marjan Int'l Corp.*, 655 F. Supp. 1275, 1277 (S.D.N.Y.), *aff'd* 868 F.2d 1267 (2d Cir. 1988)). *See also Sadat v. Mertes*, 615 F.2d at 1186 (discussing "paramount purpose of the alienage jurisdiction provision to avoid offense to foreign nations because of the possible appearance of injustice to their citizens"). The Second Circuit attempted to defend its denial of jurisdiction by labeling the corporation at issue "stateless" and summarily concluding that "there is no danger of foreign entanglements, as there is no sovereign with whom the United State[s] could . . . become entangled." 118 F.3d at 87. But, of course, this assertion is circular and assumes the answer to the question at issue. The United Kingdom's strong reaction to *Matimak* and its progeny – including the submission of the instant motion and *amicus* brief regarding its view of the citizenship of Overseas Territories corporations – belies the Second Circuit's conclusion. As Judge Sotomayor explained in dissent from the denial of rehearing *en banc* in *Koehler*:

> Whatever other intention the panels here and in *Matimak* may have had, there can be no doubt that the fundamental purpose of alienage jurisdiction – to [a]void offense to foreign nations – is frustrated by the *Matimak* decision and its further application by this panel. Paradoxically, the country we offend by these holdings [the United Kingdom] is not only a strong ally, but the very country the drafters of the alienage jurisdiction provision had in mind more than two hundred years ago when they sought to open the federal courts to foreign litigants.

Koehler, 229 F.3d at 188-89 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing *en banc*).

The United Kingdom's numerous *amicus* submissions to the Second Circuit and other courts, its Diplomatic Notes, and this brief all demonstrate the United Kingdom's deep concern over the denial of alienage jurisdiction to Overseas Territories corporations. Her Majesty's Government thus is

very much "entangled" with the United States over this issue. *See Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1243 (7th Cir. 1990) ("Certainly, the exercise of American judicial authority over the citizens of a British Dependent Territory implicates this country's relationship with the United Kingdom – precisely the *raison d'être* for applying alienage jurisdiction.").

III. PRINCIPLES OF INTERNATIONAL COMITY FAVOR CONSIDERATION OF THE UNITED KINGDOM'S POSITION REGARDING ITS OWN LAW AND CORRECTION OF THE SECOND CIRCUIT'S ERROR IN *MATIMAK*.

As a matter of international comity, the Second Circuit should have deferred to the United Kingdom's official position that its Overseas Territories corporations are United Kingdom subjects. International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). *See also In re Maxwell Communication Corp.*, 93 F.3d 1036, 1048 (2d Cir. 1996) ("Comity is a doctrine that takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law."). The Government of the United Kingdom has determined that its sovereignty extends over corporations of its Overseas Territories.

The United Kingdom's Rules Applying to International Claims expressly define the term "United Kingdom national" to include "[c]ompanies incorporated under the law of the United Kingdom or any territory for which the United Kingdom is internationally responsible." Rule 1(b), Rules Applying to International Claims, 7 Diplomatic Service Procedure Manual, Annex 1 (Mar. 1996). Similarly, the Consular Convention between the United States and the

United Kingdom defines United Kingdom "nationals" to include "all juridical entities duly created under the law of any of [the Overseas Territories]." Consular Convention, at Art. 2, Sec. (4), 3 U.S.T. 3426.

These official statements by the United Kingdom regarding the reach of its own sovereign law deserve deference. *See, e.g., In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes substantial deference to the construction France places on its domestic law."); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 490 (D.N.J. 1999) ("Although courts are not bound by a foreign government's pronouncement of which claims are cognizable, the principles of international comity dictate that a court not interfere with a foreign sovereign's pronouncement of its law."). The Consular Convention merits additional deference because it also constitutes an express recognition by the United States of the United Kingdom's sovereignty over its Overseas Territories corporations. *See United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 170 (3d Cir. 1997) (extension of comity in deferring to foreign construction of treaty furthers United States interests where United States recognizes treaty as binding itself and foreign nation).

Considerations of reciprocity also favor deferring to the United Kingdom's construction of its own law. As the Diplomatic Note explains,

> The United Kingdom notes that all corporations validly incorporated under the laws of the United States and its territories are entitled to sue and be sued in the courts of the United Kingdom and its Overseas Territories. As a matter of international comity and reciprocity, the United Kingdom considers that United States Federal Courts should be open to corporations established in United Kingdom Overseas Territories.

App. 2a (Diplomatic Note No. 90/2001 (Oct. 5, 2001)).

In light of these principles of international comity and reciprocity, the Second Circuit should have deferred to the United Kingdom's official position that its Overseas Territories corporations are United Kingdom "subjects" within the meaning of 28 U.S.C. § 1332(a)(2). *Cf. Pan Eastern Exploration Co. v. Hufo Oils*, 798 F.2d 837, 839 (5th Cir. 1986) ("Comity is not a binding obligation, but a discretionary decision that deference will best promote the mutual interests of the United States and the foreign sovereign."). The Second Circuit's failure to afford such deference constitutes an additional reason for granting *certiorari* and correcting the erroneous *Matimak* decision.

The Second Circuit has refused to distinguish *Matimak* in subsequent cases, and it has declined (over dissent) to reconsider its position *en banc*. As a consequence, review by this Court is the sole vehicle by which the court of appeals' repeated error can be corrected. *See, e.g., United States v. Ianniello,* 808 F.2d 184, 190 (2d Cir. 1986) ("This Court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this Court *en banc*."). The Second Circuit has even refused to accept the views of the United States, which consistently has taken the position that Overseas Territories corporations are United Kingdom subjects within the meaning of the statute. *See, e.g., Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 417-18 (3d Cir. 1999). Unless this Court grants review and clarifies the proper scope of alienage jurisdiction, the problems created by *Matimak* and its progeny will continue to multiply. *See* Petition at 22-23 n. 11 (discussing recent decisions within the Second Circuit dismissing actions involving Overseas Territories corporations). Her Majesty's Government therefore respectfully requests that this Court grant *certiorari* and address this important issue.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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November 21, 2001

APPENDIX

APPENDIX - DIPLOMATIC NOTE FROM THE EMBASSY OF THE UNITED KINGDOM TO THE UNITED STATES DEPARTMENT OF STATE

Note No. 90/2001

Her Britannic Majesty's Embassy presents its compliments to the U.S. Department of State and wishes to reiterate its concern, expressed in its Note No. 13/2000 of 2 February 2000, about a number of judicial decisions which have denied corporations of United Kingdom Overseas Territories access to United States Federal Courts.

The initial decision in question is that of the United States Court of Appeals for the Second Circuit in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998). The court in that case held that a Hong Kong corporation was not a "citizen" or "subject" of a "foreign state" and thus did not fall within the scope of federal alienage diversity jurisdiction under 28 U.S.C. § 1332(a)(2). The United Kingdom believes that *Matimak* was wrongly decided, primarily because it was based on an incorrect interpretation of United Kingdom company and nationality law, as well as on a misapprehension of the constitutional relationship between the United Kingdom and its Overseas Territories. Subsequent decisions have underlined the need for review and reversal of the erroneous *Matimak* decision (see annex).

The United Kingdom wishes to restate its position that corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom. The United Kingdom is therefore of the view that such corporations ought to be amenable to the alienage jurisdiction of United States Federal Courts under 28 U.S.C. § 1332(a)(2), whether as plaintiffs or defendants. Court decisions which fail to recognise such jurisdiction may have a serious detrimental effect on the trading relationship

between the United States and the United Kingdom Overseas Territories.

The United Kingdom notes that all corporations validly incorporated under the laws of the United States and its territories are entitled to sue and be sued in the courts of the United Kingdom and its Overseas Territories. As a matter of international comity and reciprocity, the United Kingdom considers that United States Federal Courts should be open to corporations established in United Kingdom Overseas Territories.

The United Kingdom notes that Chase Manhattan has communicated its intention to seek from the US Supreme Court a writ of certiorari in relation to the decision in its case by the Court of Appeals for the Second Circuit. In view of the proliferation of Second Circuit decisions enforcing the holding in *Matimak*, the United Kingdom considers it essential that the Supreme Court take this opportunity to remove the ensuing legal uncertainty concerning the transactions of corporations of United Kingdom Overseas Territories. The United Kingdom therefore intends to file a Brief *amicus curiae* to the Supreme Court in support of Chase Manhattan's application.

The United Kingdom continues to appreciate the very helpful efforts of the United States Government in submitting Briefs *amicus curiae* to United States courts on these matters which support the United Kingdom's position. In view of the opportunity presented by Chase Manhattan's application to resolve this matter definitively, the United Kingdom expresses its firm desire that the United States Government intervene in like fashion at the petition stage of this case.

Her Britannic Majesty's Embassy avails itself of this opportunity to renew to the U.S. Department of State the assurances of its highest consideration.

ANNEX

Since *Matimak*, the Second Circuit has applied its flawed reasoning to a series of subsequent cases involving corporations of UK Overseas Territories, including *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *amended*, 229 F.3d 424 (2d Cir.), *reh'g en banc denied*, 229 F.3d 187 (2d Cir. 2000); *Universal Reinsurance Co., Ltd. v. St. Paul Fire & Marine Insurance Co.*, 224 F.3d 139 (2d Cir. 2000), and, most recently, *The Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Limited*, 251 F.3d 334 (2d Cir. 2001).

The United Kingdom expressed its views to the Second Circuit in yet another case that involved the same issue, *III Finance Ltd. v. The Aegis Consumer Finance, Inc.*, No. 00-7016 (2d Cir. 2000). That case, however, settled before the court could address the issue of alienage diversity jurisdiction. Thereafter, in connection with the petition for rehearing en banc in *Koehler*, the views and materials that the United Kingdom submitted in *III Finance* were considered by the entire Second Circuit. Three judges voted to rehear the case en banc. See 229 F.3d 187 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing en banc); *id.* at 194 (Calabresi, J., dissenting from denial of rehearing en banc). Indeed, at least two of those judges expressly called for Supreme Court review of the issue:

> Because these panel decisions have caused a clear split in authority with the other circuit courts, and in light of the potential damage to relations between the United States and the United Kingdom and other nations, it can only be hoped that the Supreme Court chooses to address the resolution of this issue expeditiously.

Id. at 193-94 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing en banc).

More recently, in *Chase Manhattan Bank*, counsel for Chase resubmitted the information that the United Kingdom had presented in *III Finance*, but the panel nevertheless felt constrained to follow the earlier decision in *Matimak*.

These recent Second Circuit decisions stand in marked contrast to the holdings of other federal courts of appeals that have rejected, or independently reached a conclusion opposite from, the holding in *Matimak*. See, e.g., *Southern Cross Overseas Agencies v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 412-19 (3d Cir. 1999); *Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-43 (7th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991).

No. 01-651

IN THE

Supreme Court of the United States

THE CHASE MANHATTAN BANK, as Indenture Trustee, under the Indenture, dated as of May 6, 1998,

Petitioner,

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 19, 2001
CERTIORARI GRANTED JANUARY 4, 2002

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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

U.S. District Court
Southern District of New York

CIVIL DOCKET FOR CASE #: 99-CV-4056

The Chase Manhattan v. Traffic Stream (BVI)
Filed: 06/04/99
Assigned to: Judge Shira A. Scheindlin
Demand: $0,000
Nature of Suit: 190
Lead Docket: None
Jurisdiction: Diversity
Dkt # in other court: None
Cause: 28:1332 Diversity: Breach of Contract

THE CHASE MANHATTAN BANK, as Indenture Trustee, under the Indenture, dated as of May 6, 1998.
plaintiff

Sarah L. Reid
[COR LD NTC]
Kelley, Drye & Warren, LLP
101 Park Avenue
New York, NY 10178
(212) 808-7800

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED
defendant

Appendix A

George A. Zimmerman
[COR LD NTC]
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919 Third Avenue
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(212) 735-3000

6/4/99 1 COMPLAINT filed; Summons issued and Notice pursuant to 28 U.S.C. 636(c); FILING FEE $ 150.00 RECEIPT # 346561 (bm) [Entry date 06/07/99]

8/6/99 8 AMENDED ANSWER to Complaint by Traffic Stream (BVI): amends [6-1] answer (ls) [Entry date 08/09/99]

2/2/00 21 OPINION AND ORDER #83429; granting [10-1] motion for an order pursuant to rule 56 of the F.R.C.P. for summary judgment on all counts of the complaint against dft. Traffic Stream (BVI) Infrastructure Limited. Pltff is directed to foreclose on the Collateral Accounts and to submit a request for a deficiency judgment by 2/18/00. Deft must provide the required financial reports to pltff by 2/18/00. Once the Court sets reasonable attys' fees, the parties are directed to prepare a final judgment. (signed by Judge Shira A. Scheindlin); Copies mailed. (sac) [Edit date 02/03/00]

Appendix A

5/9/00 26 JUDGMENT #00,1079; Purs to the Court's Opinion and order dated May 8, 2000, a deficiency judgment is entered in the amount of $98,388,352.74; the Court also finds that the value of certain additional collateral, namely pledged shares of four Hong Kong companies owned by defendant and/or its shareholders will be applied against the deficiency judgment when two conditions have been satisfied, specifically transfer of ownership and an adequate, independent valuation, the value of these companies; (signed by James M. Parkison, Clerk of the Court); Mailed copies and notice of right to appeal. Entered On Docket: 05/11/00. (djc) [Entry date 05/11/00]

5/10/00 27 MEMORANDUM OPINION AND ORDER #83943, the Judgment Clerk is hereby ordered to prepare a deficiency judgment in the sum of $98,388,352.74, as further set forth in this document in accordance with this opinion (signed by Judge Shira A. Scheindlin); Copies mailed; (forwarded orig. doc. to the Judgment Clerk) (cd) [Entry date 05/11/00]

[END OF DOCKET: 1:99cv4056]

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GENERAL DOCKET FOR
Second Circuit Court of Appeals

Court of Appeals Docket #: 00-7721
Filed: 6/8/00
Nsuit: 4190
Contract: Other Contract Action
Chase Manhattan v. Traffic Stream (BVI)
Appeal from: U.S. District Court SDNY

Case type information:

1) Civil
2) Private
3) None

Lower court information:

District: 0208-01: 99-cv-4056
Trial Judge: Shira A. Scheindlin
Date Filed: 6/4/99
Date order/judgment: 5/9/00
Date NOA filed: 6/7/00

Fee status: Paid

Prior cases: None

Current cases: None

Appendix B

Panel Assignment:

Panel: JMcL RDS RNC 1705 :CA2 12/1/00 am
Date of decision: 5/24/01

CHASE MANHATTAN BANK, as Indenture Trustee, under the Indenture, dated as of May 6, 1998
Plaintiff-Appellee

Sarah L. Reid, Esq.
(212) 808-7800
[COR LD NTC ret]
Kelley, Drye & Warren LLP
101 Park Avenue
New York, NY 10178

v.

TRAFFIC STREAM (BVI)
INFRASTRUCTURE LIMITED
Defendant-Appellant

Shmuel Vasser, Esq.
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Appendix B

6/8/00	Copy of notice of appeal and district court docket entries on behalf of Appellant Traffic Stream (BVI) filed. [00-7721] Form C due on 6/19/00. Form D due on 6/19/00. (cv77)
8/15/00	Appellant Traffic Stream (BVI) joint appendix filed w/pfs. Number of volumes: 1. (cv77)
12/1/00	Case heard before McLAUGHLIN, SACK, C.JJ., CHATIGNY, D.J. (TAPE: 14) (ca96)
12/11/00	Appellant Traffic Stream (BVI) post argument letter brief filed. CC: Panel (cv72)
12/18/00	Appellee Chase Manhattan Bank post argument letter brief filed. (cv72)
5/24/01	Judgment of the district court is REVERSED & REMANDED by published unsigned PER CURIAM opinion filed. (cv72)
5/24/01	Judgment filed. [Entry Date: 5/24/01] (cv72)
7/24/01	Order FILED DENYING petition for REHEARING [1873288-1] by Appellee Chase Manhattan Bank, endorsed on motion dated 6/7/01. (cv72)
12/6/01	Order FILED GRANTING motion for stay [1968087-1] by Appellee Chase Manhattan Bank, endorsed on motion form dated 11/20/01. Before Hon. JMcL, RDS, Circuit Judges, Hon, RNC, District Judge. For The Court, AH, AA (cv72)

APPENDIX C — COMPLAINT DATED JUNE 3, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION NO. 99 CIV. 4056

THE CHASE MANHATTAN BANK, AS INDENTURE TRUSTEE, UNDER THE INDENTURE, DATED AS OF MAY 6, 1998,

Plaintiff,

-against-

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Defendant.

COMPLAINT

Plaintiff, The Chase Manhattan Bank, as Indenture Trustee (the "Trustee"), under the Indenture, dated as of May 6, 1998 (the "Indenture"), of Traffic Stream (BVI) Infrastructure Limited ("Traffic Stream BVI" or "Defendant"), pursuant to which were issued $119,000,000 aggregate principal amount of Traffic Stream BVI's 14¼% Senior Secured Notes due 2006 (the "Notes"), by and through its attorneys, Kelley Drye & Warren LLP, alleges:

JURISDICTION

1. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1332. The amount in controversy exceeds $75,000.

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THE PARTIES

2. The Trustee, The Chase Manhattan Bank, is a corporation existing under and by the laws of the State of New York, authorized to exercise trust powers, with its Capital Markets Fiduciary Services office located at 450 West 33rd Street, New York, New York 10001.

3. Upon information and belief, Defendant Traffic Stream BVI is a corporation organized and existing under the laws of the British Virgin Islands, with its principal office at P.O. Box 957, Offshore Incorporations Centre, Road Town, Tortola, British Virgin Islands.

NATURE OF CLAIM

4. This is an action for breach of contract arising out of Defendant's breach of its obligations under the Indenture and related documents. The Trustee seeks an Order of Foreclosure on certain collateral which secures the Defendant's obligations under the Notes and the Indenture. Specifically, the Trustee seeks an Order granting it control of certain accounts (the "Collateral") held at The Chase Manhattan Bank, 450 West 33rd Street, New York, New York. The Trustee is entitled to possession of the Collateral because of the occurrence of Events of Default under the Indenture for which the Collateral is security. The Trustee also seeks an Order specifically enforcing the Defendant's obligations to provide the Trustee with financial information and directing an accounting from the Defendant.

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BACKGROUND

5. The Defendant is a British Virgin Islands corporation which indirectly owns interests in thirteen Chinese-foreign cooperative joint ventures (the "Joint Ventures") which operate six toll-road projects ("Project Toll Roads") in China.

6. Upon information and belief, the Defendant owns interests in the Joint Ventures through four wholly owned subsidiaries incorporated under the laws of Hong Kong: (i) South-East Asia (China) Infrastructure Limited; (ii) South-East Asia Strategy Limited; (iii) South-East Asia Shao Fu Development Company Limited; and (iv) Traffic Stream Infrastructure Company Limited (collectively, the "Hong Kong Companies"). Each Hong Kong Company also issued certain non-voting deferred shares to two individuals, Ng Hon Leung and Ng Yu-Kim, and South-East Asia Investment Holding Co., Ltd. ("Holding") (each individual and Holding collectively, the "Other Shareholders"). Holding is a company incorporated under the laws of Hong Kong.

7. On or about May 6, 1998, the Defendant and the Trustee entered into the Indenture, pursuant to which the Defendant issued its 14¼% Senior Secured Notes due 2006, to holders of the Notes (the "Holders"), in the aggregate principal amount of $119,000,000. (A copy of the Indenture is attached hereto as Exhibit A).

8. According to the Indenture, "[t]his Indenture and the Notes shall be governed by and construed in accordance with the laws of the State of New York." (Ex. A, § 111).

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9. Pursuant to Section 112 of the Indenture, the Defendant has consented to the jurisdiction of this Court for any action, whether at law or in equity, brought in connection with the Indenture or the Notes:

> The [Defendant] irrevocably submits to the jurisdiction of any court of the State of New York or any United States federal court sitting in the Borough of Manhattan, New York City, New York, United States, and any appellate court from any thereof, and waives any immunity from the jurisdiction of such courts over any suit, action or proceeding that may be brought in connection with this Indenture or the Notes. The [Defendant] irrevocably waives, to the fullest extent permitted by law, any objection to any suit, action or proceeding that may be brought in connection with this Indenture or the Notes, including such actions, suits or proceedings relating to securities laws of the United States of America or any state thereof, in such courts whether on the grounds of venue, residence or domicile or on the ground that any such suit, action or proceeding has been brought in an inconvenient forum. The [Defendant] agrees that final judgment in any such suit, action or proceeding brought in such court shall be conclusive and binding upon the [Defendant] and may be enforced in any court to the jurisdiction of which the [Defendant] is subject by a suit upon such judgment.

(Ex. A, § 112(a)).

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10. Pursuant to the Indenture, interest on the Notes is payable semi-annually in May and November each year, commencing on November 1, 1998. (Ex. A, § 301).

11. The payment obligations of the Defendant under the Notes are secured by the grant of security interests in favor of the Trustee. The Collateral includes, but is not limited to, the following accounts: the Debt Service Reserve Account, the Construction Funding Account, the Joint Venture Distribution Account and the Note Redemption Account and all amounts deposited therein at any time (the "Collateral Accounts"). Section 1301 of the Indenture provides that:

> As security for the payment and performance by the [Defendant] of its obligations under this Indenture and the Notes, upon the terms and conditions set forth in this Indenture, (A) the [Defendant] hereby grants to, and charges by way of a first fixed charge in favor of, the Trustee for the benefit of the Holders of the Notes a first priority security interest in all the [Defendant's] rights, title and interest in and to (i) the Debt Service Reserve Account, the Construction Funding Account, the Joint Venture Distribution Account and the Note Redemption Account and all amounts deposited therein at any time (the "Collateral Accounts");

(Ex. A, § 1301).

12. The Trustee perfected its security interests in the Collateral by possession, in accordance with applicable law.

13. The purpose of the Debt Service Reserve Account is to secure the Defendant's obligation to pay the interest owed by the Defendant on the Notes on each Interest Payment Date. The Indenture requires the Defendant to, within 30 days of an Interest Payment Date, ensure that the amount in the Account equals the amount of interest due and payable on the Notes on the next succeeding Interest Payment Date. (Ex. A, § 1304). The present balance of the Debt Service Reserve Account is $9,070,618.78.

14. The Construction Funding Account was created to fund the construction of Project Toll Roads. The Indenture required the Defendant to deposit, and the Defendant deposited, $105,131,250.00 into the Construction Funding Account on the issue date. (Ex. A, § 1305). After several withdrawals to fund part of the construction of the Toll Roads, the present balance of the Construction Funding Account is $38,026,524.10.

15. The Joint Venture Distribution Account was to be comprised of deposits by the Joint Ventures of all amounts relating to distributions payable to the Hong Kong Holding Companies pursuant to the applicable Joint Venture Contracts. It was also to be comprised of Capital Contributions received by the Trustee pursuant to Section 1017 of the Indenture. (Ex. A, § 1306). There is currently a balance of $1,680.96 in the Joint Venture Distribution Account.

16. The funds in the Note Redemption Account are to be used to redeem selected Notes held by Holders on each Mandatory Redemption Date starting on May 1, 2001. The funds are to be transferred from the Joint Venture Distribution

Account. (Ex. A, § 1307). There are currently no funds in the Note Redemption Account.

17. In addition, under the Indenture and the Letter of Credit Procurement and Deposit Agreement (the "LOC Agreement"), dated May 6, 1998, by and among the Defendant, Traffic Stream Infrastructure Holdings Company Limited ("Traffic Stream Holdings"), Traffic Stream (China) Infrastructure Company Limited ("Traffic Stream (China)"), Mr. Ng Hon Leung, and China Nonferrous Metals Holdings (Hong Kong) Limited ("CNMH"), Traffic Stream Holdings, Traffic Stream (China), Mr. Ng Hon Leung and CNMH each agreed to procure and deliver a Letter of Credit (the "LOC") in the amount of $8,058,750 to the Trustee on or before January 6, 1999. (A copy of the LOC Agreement is attached hereto as Exhibit B). Both Traffic Stream (China) and Traffic Stream Holdings also agreed to replace the LOC by depositing, no later than May 6, 1999, cash in the aggregate amount of $8,058,750 into the Construction Funding Account.

18. The Indenture provides that upon the occurrence of an Event of Default, the Trustee or the Holders of not less than 25% in aggregate principal amount of the Notes outstanding may, and under certain circumstances the Trustee must, "declare the principal of, premium, if any, and accrued interest on all of the Outstanding Notes immediately due and payable, and upon any such declaration all such amounts payable in respect of the Notes shall become immediately due and payable." (Ex. A, § 502).

19. Pursuant to the Indenture, if a default in the payment of interest or principal occurs, the Defendant, upon demand of the Trustee, must pay the whole amount due:

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The [Defendant] covenants that if: (a) default is made in the payment of any installment of interest including Additional Interest, if any, any Additional Amounts, if any, on any Note when such interest or Additional Amounts becomes due and payable and such default continues for a period of five Business Days, or (b) default is made in the payment of the principal of or premium, if any, on any Note at the Stated Maturity thereof, or on any Mandatory Redemption Date, *the [Defendant] will, upon demand of the Trustee, pay to the Trustee for the benefit of the Holders of such Notes, the whole amount then due and payable on such Notes for principal, premium, if any, interest on Additional Amounts, if any, and interest on any overdue principal, premium, if any, or Additional Amounts, if any*, and, to the extent that payment of such interest shall be legally enforceable, upon any overdue installment of interest, including Additional Interest, if any and overdue principal, at the rate borne by the Notes, and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel.

(Ex. A, §503) (emphasis added).

20. Pursuant to Section 501 of the Indenture, Events of Default, among other things, include the late payment of interest or principal and the failure to deliver the Letter of Credit:

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(1) default in the payment of any interest, including Additional Interest, if any, and Additional Amounts, if any, in respect of interest on any Note when it becomes due and payable and continuance of such default for a period of five Business Days; or

(2) default in the payment of the principal of or premium, if any, on any Note when it becomes due and payable at its stated maturity, or the failure to redeem Notes in the required principal amounts on any Mandatory Redemption Date; or . . .

(4) the failure to deliver to the Trustee, the LOC on or before January 6, 1999 as provided in the LOC and Deposit Agreement (unless the Deposit shall have been made on or before January 6, 1999), or the failure to make the Deposit into the Construction Funding Account on or before May 6, 1999 as provided in the LOC and Deposit Agreement (unless as a result of such failure the Trustee shall have the right to draw such amount under the LOC, in which case no Event of Default shall occur unless and until the drawing thereunder shall have been dishonored by the issuer of such LOC), each on the respective terms and conditions set out in the LOC and Deposit Agreement as in effect on the date hereof and the LOC; or . . .

(Ex. A, § 501).

21. Section 1009 of the Indenture requires the Defendant to provide the Trustee with a variety of financial statements

and reports. The Defendant is required to provide such financial statements to the Trustee regardless of whether the Defendant is subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, as amended. (Ex. A, § 1009).

THE DEFENDANT DEFAULTS ON ITS PAYMENT OBLIGATIONS UNDER THE INDENTURE

22. The Defendant is currently in default under the Notes and under the Indenture. No LOC was delivered to the Trustee on or before January 6, 1999. The failure to deliver the LOC constitutes an Event of Default under Section 501(4) of the Indenture.

23. On January 11, 1999, an LOC in the amount of $4,460,000 was delivered to the Trustee. On February 12, 1999, the Defendant delivered to the Trustee a second LOC in the amount of $1,100,000, leaving a balance of $2,498,750, which remains outstanding.

24. On March 24, 1999, certain Holders, who hold more than 25% of the Notes, delivered to the Defendant a Declaration of Acceleration pursuant to Section 502 of the Indenture. This caused all amounts due under the Notes to become due and payable immediately on that date.

25. In the Declaration of Acceleration, the Holders further demanded "the immediate payment in full" of the Notes. Notwithstanding the foregoing, the Defendant has failed to pay any amounts on the Notes. Even in the absence of the acceleration, the Defendant failed to make the interest

payment on May 3, 1999, the first Business Day after the originally scheduled May 1, 1999 Interest Payment Date, and failed to make such interest payment for five business days thereafter. The failures to make such payments of principal and interest constitute additional Events of Default under Section 501(1) and (2) of the Indenture.

26. Pursuant to Section 2 of the LOC Agreement, Traffic Stream Holdings and Traffic Stream (China) each agreed to deposit into the Construction Funding Account (as defined in the Indenture) $8,058,750 on or before May 6, 1999, which amount may be reduced by any amount drawn under the LOC delivered to the Trustee.

27. No deposit was made on or before May 6, 1999, and the Trustee, therefore, drew the entire amount available under the two LOCs previously delivered to it. This left a balance of $2,498,750 which remains unpaid. The failure to make this deposit also constitutes an Event of Default under Section 501(4) of the Indenture.

28. By reason of the first Event of Default resulting from the failure to deliver the LOC in full by January 6, 1999, and the ensuing Declaration of Acceleration, the following amounts are now due and payable to the Trustee on behalf of the Holders:

(i) $119,000,000 aggregate principal amount of the Notes;

(ii) any Additional Amounts (as defined in the Indenture) payable on the Notes;

(iii) all accrued and unpaid interest on the Notes, including without limitation, on (a) the overdue $119,000,000 principal amount, (b) any Additional Amounts, and (c) to the extent legally enforceable, any overdue interest, in each case, at the rate borne by the Notes, plus Additional Interest (as defined in the Indenture), if any, to the date of payment;

(iv) all costs and expenses of collection, including the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel;

(v) $2,498,750 which was due and payable on or before May 6, 1999, for deposit into the Construction Funding Account, pursuant to Section 2 of the LOC Agreement, plus interest thereon; and

(vi) any and all other amounts due under the Indenture or any of the Security Documents (as defined in the Indenture).

29. The Defendant has also failed to provide financial statements and reports to the Trustee as required by Section 1009 of the Indenture.

30. The Indenture provides that upon the occurrence of an Event of Default, the Trustee may institute judicial proceedings for collection of the sums due from the

Defendant, for specific performance of any agreement in the Indenture or Security Documents or to enforce any other proper remedy:

> If the [Defendant] fails to pay such amounts forthwith upon such demand, the Trustee, in its own name as trustee of an express trust, may institute a judicial proceeding for the collection of the sums so due and unpaid, may prosecute such proceeding to judgment or final decree, and may enforce the same against the [Defendant] or any other obligor upon the Notes and collect the moneys adjudged or decreed to be payable in the manner provided by law out of the property of the [Defendant] or any other obligor upon the Notes, wherever situated.
>
> If an Event of Default occurs and is continuing, the Trustee may in its discretion, proceed to protect and enforce its rights and the rights of the Holders by such appropriate judicial proceedings as the Trustee shall deem most effectual to protect and enforce any such rights, *whether for the specific enforcement of any covenant or agreement in this Indenture or the Security Documents or in aid of the exercise of any power granted herein or therein, or to enforce any other proper remedy.*

(Ex. A, § 503) (emphasis added).

31. The Defendant currently owes $10,558,623.80 in interest for the period of November 1, 1998 through

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May 31, 1999. Thus, the current amount of the Defendant's indebtedness is $129,558,623.80. Interest continues to accrue at a rate of $52,516.67 per day.

FIRST CAUSE OF ACTION
BREACH OF CONTRACT

32. The Trustee repeats and realleges the allegations contained in Paragraphs 1 through 31 as if fully set forth herein.

33. Def dant Traffic Stream has defaulted under the terms of the Indenture.

34. 25% of the Holders have demanded that Defendant pay the whole amount due and payable on the Notes and the Trustee has demanded delivery of the Letter of Credit, but Defendant has refused to do so.

35. Section 503 of the Indenture provides that upon the happening of an Event of Default, the Trustee may take recourse to whatever remedy it deems most effectual to enforce its rights and those of the Holders.

36. The Trustee hereby asserts its rights under N.Y. U.C.C. § 9-503 (McKinney 1990), including but not limited to, the Trustee's right to take possession of and dispose of all of the Collateral under the Indenture, for the purpose of satisfying, in whole or in part, the obligations owed to the Trustee and the Holders by Defendant Traffic Stream BVI under the Indenture.

37. The Trustee is also entitled to a deficiency judgment in an amount of at least $82,459,799.96 (plus interest from

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June 1, 1999 and thereafter and the fees and expenses of the Indenture Trustee), the amount by which Defendant Traffic Stream BVI's indebtedness exceeds the value of the Collateral.

SECOND CAUSE OF ACTION
REPLEVIN OF COLLATERAL

38. The Trustee repeats and realleges the allegations contained in Paragraphs 1 through 37 as if fully set forth herein.

39. By virtue of Defendant Traffic Stream BVI's Events of Default under the Indenture, the Trustee is entitled to possession of the Collateral under the common law doctrine of replevin.

THIRD CAUSE OF ACTION
BREACH OF CONTRACT
SPECIFIC ENFORCEMENT OF DEFENDANT'S REPORTING OBLIGATIONS

40. The Trustee repeats and realleges the allegations contained in Paragraphs 1 through 39 as if fully set forth herein.

41. The Defendant has failed to provide the financial statements and reports to the Trustee as required by Section 1009 of the Indenture.

42. The Defendant's failure to provide the required financial information has made it impossible for the Trustee and the Noteholders to evaluate the financial situation of Defendant. It also has prevented the Trustee from evaluating the amounts it may recover for the Noteholders apart from

the Collateral. There is no adequate remedy at law for Defendant's failure.

43. Section 1303 of the Indenture explicitly authorizes the Trustee to seek "specific enforcement of any covenant or agreement in [the] Indenture . . . ."

44. The Trustee thus seeks specific enforcement of Defendant's obligations to provide financial information to the Trustee.

FOURTH CAUSE OF ACTION ACCOUNTING

45. The Trustee repeats and realleges the allegations contained in Paragraphs 1 through 44 as if fully set forth herein.

46. Under the circumstances here presented, the Defendant, as issuer of the Notes, and upon information and belief, being insolvent, has a fiduciary relationship with the Holders. The Trustee has the authority to enforce the Holders' rights under the Indenture.

47. The Defendant is required to pay the full amounts of principal and interest on the Notes to the Holders. The Defendant has defaulted under the terms of the Indenture and failed to provide the Trustee with the financial information required by the Indenture. It therefore holds property that belongs to the Trustee and the Holders.

48. Because of the Defendant's failure to provide the required financial information to the Trustee, it is impossible to determine the full extent of its assets and what the Trustee and Holders can look to in order to satisfy the Defendant's debt.

49. Because no adequate legal remedy exists, the Court should enter an Order directing an accounting of the Defendant.

FIFTH CAUSE OF ACTION
RECOVERY OF COSTS OF COLLECTION

50. The Trustee repeats and realleges the allegations contained in Paragraphs 1 through 49 as if fully set forth herein.

51. The Indenture provides that the Defendant Traffic Stream BVI will pay the Trustee "such further amount as shall be sufficient to cover the costs and expenses of collection, including reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel." (Ex. A, § 503).

52. The Trustee has incurred and will continue to incur such expenses until such time as a judgment is entered in its favor or it otherwise fully enforces its rights under the Indenture.

WHEREFORE, the Trustee requests that judgment be granted and entered in its favor and an award be entered: as against Defendant Traffic Stream BVI (i) granting the Trustee possession of the Collateral; (ii) awarding the Trustee damages in an amount of $82,459,799.96, plus interest from June 1, 1999 at the rate of $52,516.67 per day, the amount representing the difference between the amount of Defendant's indebtedness and the amount of the Collateral; (iii) specifically enforcing the Defendant's reporting obligations under the Indenture; (iv) ordering an accounting; and (v) awarding the Trustee costs and expenses incurred in bringing this action, including attorneys' fees and such other and further relief as the Court deems just and proper.

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DATED: June 3, 1999 Respectfully submitted,

KELLEY DRYE & WARREN LLP

By: s/ Sarah L. Reid
Sarah L. Reid, Esq.
Attorneys for Plaintiff
THE CHASE MANHATTAN
BANK, AS INDENTURE
TRUSTEE UNDER THE
INDENTURE,
DATED AS OF MAY 6, 1998

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EXHIBIT A TO COMPLAINT — INDENTURE BETWEEN TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED AND THE CHASE MANHATTAN BANK, AS TRUSTEE, DATED MAY 6, 1998

TRAFFIC STREAM (BVI)
INFRASTRUCTURE LIMITED

TO

THE CHASE MANHATTAN BANK,

as Trustee

and

CHASE MANHATTAN BANK LUXEMBOURG S.A.

as Paying Agent

Indenture

Dated as of May 6, 1998

US$119,000,000

14¼% Senior Secured Notes

due May 1, 2006

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**TRAFFIC STREAM (CHINA)
INFRASTRUCTURE COMPANY LIMITED**

Reconciliation and tie between Trust Indenture Act of 1939 and Indenture, dated as of May 6, 1998

Trust Indenture Act Section	**Indenture Section**
§ 310(a)(1)	607
(a)(2)	607
(b)	608
§ 312(c)	701
§ 314(a)	703
(a)(4)	1008(a)
(c)(1)	102
(c)(2)	102
(e)	102
§ 315(b)	601
§ 316(a)(last sentence)	101 ("Outstanding")
(a)(1)(A)	502, 512
(a)(1)(B)	513
(b)	508
(c)	104(d)
§ 317(a)(1)	503
(a)(2)	504
(b)	1003
§ 318(a)	111

Note: This reconciliation and tie shall not, for any purpose, be deemed to be a part of the Indenture.

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INDENTURE, dated as of May 6, 1998 between TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED, a corporation duly organized and existing under the laws of The British Virgin Islands (for purposes of this Indenture, the term "Company" refers only to Traffic Stream (BVI) Infrastructure Limited and does not include its Subsidiaries), having its principal office at P.O. Box 957, Offshore Corporations Centre, Road Town, Tortola, British Virgin Islands, and The Chase Manhattan Bank, a New York banking corporation organized and existing under the laws of the State of New York, as Trustee (herein called the "Trustee") and Chase Manhattan Bank Luxembourg S.A., as the Paying Agent in Luxembourg.

RECITALS OF THE COMPANY

The Company has duly authorized the creation of an issue of 14¼% Senior Secured Notes due 2006 (herein called the "Initial Notes"), and 14¼% Senior Secured Notes due 2006 (the "Exchange Notes" and together with the Initial Notes, the "Notes"), of substantially the tenor and amount hereinafter set forth, and to provide therefor the Company has duly authorized the execution and delivery of this Indenture.

Upon the issuance of the Exchange Notes, if any, or the effectiveness of the Shelf Registration Statement (as defined herein), this Indenture will be subject to the provisions of the Trust Indenture Act of 1939, as amended (the "TIA"), that are required to be part of this Indenture and shall, to the extent applicable, be governed by such provisions.

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All things necessary have been done to make the Notes, when executed by the Company and authenticated and delivered hereunder and duly issued by the Company, the valid obligations of the Company and to make this Indenture a valid agreement of the Company, in accordance with their and its terms.

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

For and in consideration of the premises and the purchase of the Notes by the Holders thereof, it is mutually covenanted and agreed, for the equal and proportionate benefit of all Holders of the Notes, as follows:

ARTICLE ONE

DEFINITIONS AND OTHER PROVISIONS OF GENERAL APPLICATION

SECTION 101. *Definitions.*

For all purposes of this Indenture, except as otherwise expressly provided or unless the context otherwise requires:

(a) the terms defined in this Article have the meanings assigned to them in this Article, and words in the singular include the plurals as well as the singular, and the words in the plural include the singular as well as the plural;

(b) all other terms used herein which are defined in the TIA, either directly or by reference therein, have the meanings assigned to them therein, and the terms "cash transaction"

and "self-liquidating paper", as used in TIA Section 311, shall have the meanings assigned to them in the rules of the Commission adopted under the TIA;

(c) all accounting terms not otherwise defined herein have the meanings assigned to them in accordance with generally accepted accounting principles, and, except as otherwise herein expressly provided, the term "generally accepted accounting principles" with respect to any computation required or permitted hereunder shall mean such accounting principles as are generally accepted at the date of such computation;

(d) the words "herein", "hereof" and "hereunder" and other words of similar import refer to this Indenture as a whole and not to any particular Article, Section or other subdivision;

(e) the word "or" is not exclusive; and

(f) provisions of this Indenture apply to successive events and transactions.

"Act", when used with respect to any Holder, has the meaning specified in Section 104.

"Additional Amounts" has the meaning set forth in Section 1026.

"Additional Interest" means Special Interest and/or Penalty Interest, as applicable.

"Additional Joint Venture Capital Contribution" means the making of a capital contribution or shareholder loan to, or the purchase of Capital Stock of, a Hong Kong Holding Company by the Company, the proceeds of which transaction are used by the Hong Kong Holding Company to make a capital contribution or shareholder loan to or purchase Capital Stock of a Toll Road Joint Venture solely for the purpose of covering operating or management expenses, or unanticipated capital expenditures, of the Toll Road Joint Ventures, which expenses or expenditures are not otherwise obligated to be paid by the Chinese partner in such Toll Road Joint Venture.

"Affiliate" of any Person means (i) any other Person which, directly or indirectly, is in control of, is controlled by or is under common control with such Person or (ii) any other Person who is a commissioner, director or officer (A) of such Person, (B) of any Subsidiary of such Person or (C) of any Person described in clause (i) above. For purposes of this definition, "control" of a Person means the power, direct or indirect, to direct or cause the direction of the management and policies of such Person whether by contract or otherwise, and the terms "controlling" and "controlled" have meanings correlative to the foregoing.

"Agent" means any Registrar, Paying Agent or Authenticating Agent.

"Agent Member" shall have the meaning specified in Section 306(a).

"Asset Disposition" in respect of the Company or any Subsidiary means any sale, conveyance, lease (including,

without limitation, any Sale/Leaseback Transaction), transfer or other disposition (in a single transaction or series of related transactions) of shares of Capital Stock of any Person other than the Company (other than directors' qualifying shares), property or other assets (each such action referred to for the purposes of this definition as a "disposition") by the Company or any Subsidiary, including any disposition by means of a merger, consolidation or similar transaction, other than (a) a disposition of property or assets (other than Collateral) by a Subsidiary to the Company or by the Company to a Wholly Owned Subsidiary or between or among Wholly Owned Subsidiaries, (b) any Permitted Investment, (c) any Restricted Payment that is made in conformity with Section 1011, (d) any disposition of property or assets by means of a merger or consolidation made in conformity with Section 801, or (e) any disposition of property or assets (other than Collateral) in the ordinary course of business.

"Assignment of Receivables" means the assignment of receivables dated as of the date hereof between the Company and the Collateral Agent.

"Attributable Indebtedness" in respect of a Sale/Leaseback Transaction means, at the time of determination, the greater of (i) the Fair Market Value of the property subject to the Sale/Leaseback Transaction (as determined in good faith by a majority of the Board of Directors of the Company) or (ii) the present value (discounted at the interest rate borne by the weighted average of all Notes Outstanding compounded annually) of the total obligations of the lessee for rental payments during the remaining term of the lease included in such Sale/Leaseback Transaction (including any period for which such lease has been extended).

"Authenticating Agent" means the Trustee or any Person authorized by the Trustee to act on behalf of the Trustee to authenticate Notes.

"Bankruptcy Law" means Title 11, United States Bankruptcy Code of 1978, as amended, or any similar United States federal or state law, or any similar law of any other jurisdiction, relating to bankruptcy, insolvency, receivership, winding-up, liquidation, reorganization or relief of debtors or any amendment to, succession to or change in any such law.

"Bermuda Share Swap" means the acquisition of the entire issued share capital of Traffic Stream (China) by the Holding Company in exchange for the issue and allotment of shares in the Holding Company so that existing shareholders of Traffic Stream (China) will become shareholders of the Holding Company.

"Board of Directors" means, with respect to any Person, the Board of Directors or similar governing body of such Person elected or appointed to manage the business of such Person or one or more Directors duly authorized to act on behalf of such Board of Directors.

"Board Resolution" means a copy of a resolution certified by the Secretary or an Assistant Secretary of the Company to have been duly adopted by the Board of Directors and to be in full force and effect on the date of such certification, and delivered to the Trustee.

"Business Day" means each Monday, Tuesday, Wednesday, Thursday and Friday which is not a day on which banking

institutions in The City of New York or in Hong Kong Special Administrative Region of the People's Republic of China are authorized or obligated by law or executive order to close.

"Calculation Date" means the date which falls 45 days after each Determination Date.

"Capital Contribution" means the making of a shareholder loan, which loan constitutes Subordinated Indebtedness of the Company, or the purchase of Capital Stock of the Company, for the purposes contemplated by Section 1017.

"Capital Lease Obligation" means, with respect to any Person, any obligation that is required to be classified and accounted for as a capital lease on the face of a balance sheet of such Person prepared in accordance with GAAP. The amount of such obligation at any date shall be the capitalized amount thereof at such date, determined in accordance with GAAP, and the Stated Maturity thereof shall be the date of the last payment of rent or any other amount due under such lease prior to the first date upon which such lease may be terminated by the lessee without payment of a penalty.

"Capital Stock" of any Person means any and all shares, interests, rights to purchase or of conversion or exchange, warrants, options, participation or other equivalents of or interests in (however designated) capital stock of a corporation, including any Preferred Stock, or any and all equivalent equity ownership interests (including partnership and joint venture interests) in a Person other than a corporation.

"Cash Flow" means, with respect to any period, the excess of (A) the aggregate amount (without duplication) of dividends, distributions and payments of interest and principal on loans from the Company to any of its Subsidiaries, in each case, that are received by the Company or any Wholly Owned Subsidiary directly or indirectly from the Project Toll Road Joint Ventures and deposited into the Joint Venture Distribution Account during such period over (B) the aggregate expenses of the Company and its Wholly Owned Subsidiaries for such period (determined in each case in accordance with GAAP and without duplication and excluding in each case any expense of the Toll Road Joint Ventures) that have not been paid or reimbursed from management fees paid by the Holding Company.

"Certificated Notes" means those physical notes issued in exchange for Global Notes and which are payable to a Person other than the Depositary.

"Change of Control" means any time when (i) Mr. Ng Hon Leung, Chairman of the Board of Directors of the Company, and China National Nonferrous Metal Industry Corporation (together with its Affiliates) cease to have the power to vote, or the power to direct the vote, an aggregate of at least 51% of the Voting Stock of the Company, or (ii) Mr. Ng Hon Leung ceases to have the power to vote, or the power to direct the vote, at least 35% of the Voting Stock of the Company.

"CNMH" means China Nonferrous Metals Holdings (Hong Kong) Limited, a company organized under the laws of Hong Kong.

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"Collateral" means the collateral as described in Section 1301.

"Collateral Accounts" mean the Joint Venture Distribution Account, the Debt Service Reserve Account, the Construction Funding Accounts and the Note Redemption Account.

"Collateral Agent" means the Trustee acting as collateral agent under the Security Documents.

"Collateral Assignment Agreements" means the several Collateral Assignment Agreements between each of the four Hong Kong Holding Companies and the Collateral Agent, dated the date hereof.

"Commission" means the United States Securities and Exchange Commission.

"Company" means the Person named as the "Company" in the first paragraph of this Indenture, until a successor Person shall have become such pursuant to the applicable provisions of this Indenture, and thereafter "Company" shall mean such successor Person.

"Company Request" or "Company Order" means a written request or order signed in the name of the Company by its Board of Directors, any of its Directors or by its Chairman or Secretary, and delivered to the Trustee.

"Construction Funding Account" shall have the meaning specified in Section 1305.

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"Corporate Trust Office" means the office of the Trustee at which at any particular time its corporate trust business shall be principally administered, which office at the date of execution of this Indenture is located at 450 West 33rd Street, 15th Floor, New York, New York, 10001, attn.: Global Trust Services.

"Corporation" includes corporations, associations, companies and business trusts.

"Debt Service Coverage Ratio" means the ratio of (i) the sum of (a) Cash Flow of the Company for the last four full fiscal quarters ending on the most recent Determination Date (the "Measurement Period") *plus* (b) the amount in the Joint Venture Distribution Account at the beginning of the Measurement Period to (ii) Interest Expense and mandatory redemption payments for such Measurement Period.

"Debt Service Coverage Support Agreement" means the agreement dated as of the Issue Date among Traffic Stream (China), the Holding Company and the Company.

"Debt Service Reserve Account" shall have the meaning specified in Section 1304.

"Default" means any event which is, or after notice or passage of time or both would be, an Event of Default.

"Defaulted Interest" shall have the meaning specified in Section 309.

"Deposit" means the deposit of US$8,058,750 required to be deposited into the Construction Funding Account pursuant to the terms of the LOC and Deposit Agreement.

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"Depositary or "DTC" " means The Depositary Trust Company or such other depositary as may in the future replace DTC as depositary for the Notes.

"Determination Date" means the last day of each calendar year, with the first Determination Date being December 31, 1999.

"Dollar Permitted Investments" means investments which are denominated and payable in US dollars in any one or more of the following: (i) securities with maturities of one year or less from the date of acquisition that are (a) direct, interest-bearing obligations of the United States in certificated form; (b) direct, interest-bearing obligations of and guaranteed as to timely payment of principal and interest by, the United States, but only if such obligations are issued in the form of an entry made on the records of the Federal Reserve Bank of New York; and (c) direct, interest-bearing obligations of, and interest-bearing obligations guaranteed as to timely payment of principal and interest by, the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation or the Student Loan Marketing Association, but only if (A) at the time of investment, such obligations are assigned the highest credit rating by the Rating Agencies and (B) such obligations have been deposited with The Depository Trust Company and its successors, or are issued in the form of an entry made on the records of the Federal Reserve Bank of New York; (ii) certificates of deposit with an original term to maturity of not more than 180 days issued by any depositary institution or trust company organized under the laws of the United States or any State thereof whose principal offices are located in the Borough of Manhattan,

Appendix C

City and State of New York, New York (including the Trustee acting in its individual capacity), or demand or time deposits of such institution; *provided* that the short-term unsecured debt obligations of such depositary institution or trust company at the time of such investment are assigned a rating of "A-1" by S&P and "P-1" by Moody's or the long-term unsecured debt obligations of such depositary institution or trust company at the time of such investment are assigned a rating of "BBB" or higher by S&P and "Baa" or higher by Moody's; (iii) repurchase obligations pursuant to a written agreement (a) with respect to any obligation described in clause (i) above, where (in each case) the Trustee has taken delivery of such obligation and (b) by a U.S. depositary institution or trust company whose principal offices are located in the Borough of Manhattan, City and State of New York, New York, the short-term unsecured debt obligations of which are rated "A-1" by S&P and "P-1" by Moody's at the time of such investment or the long-term unsecured debt obligations of which are rated "BBB" or higher by S&P and "Baa" or higher by Moody's (including, if applicable, the Trustee acting in its individual capacity) at the time of such investment; (iv) commercial paper that (a) is assigned a rating of "A-1" by S&P and "P-1" by Moody's at the time of such investment and (b) had an original term to maturity of not more than 180 days; (v) separate account portfolios managed by a professional money manager which have average portfolio duration of no longer than six months, invest in securities with maximum average maturities of no longer than two years for fixed rate securities and three years for floating rate securities, and are restricted to investing in securities rated "A2/P2" (or equivalent) or better by S&P or Moody's for short-term securities and "A-" or better or equivalent for

long term securities. Notwithstanding the foregoing, the maturity of any investment referred to in clauses (i) through (v) made with funds from the Debt Service Reserve Account, the Construction Funding Account, the Joint Venture Distribution Account or Note Redemption Account shall be no later than a date which is at least 25 Business Days prior to the Stated Maturity of the Notes.

"Event of Default" shall have the meaning specified in Section 501.

"Excess Project Construction Funds" means the amount of funds remaining in the Construction Funding Account after the Company has delivered to the Trustee an Officer's Certificate certifying that both Toll Roads Under Development are fully operational and collecting tolls at all toll stations.

"Exchange Act" means the Securities Exchange Act of 1934, as amended.

"Exchange Date" shall have the meaning specified in the Registration Rights Agreement.

"Exchange Notes" has the meaning stated in the first recital of this Indenture and refers to any Exchange Notes containing terms substantially identical to the Initial Notes (except that such Exchange Notes shall not contain terms with respect to transfer restrictions and certain provisions relating to an increase in the stated rate of interest) that are issued and exchanged for the Initial Notes pursuant to the Registration Rights Agreement and this Indenture.

"Exchange Offer" means the exchange offer that may be effected pursuant to the Registration Rights Agreement.

"Exchange Rate" means the noon buying rate in New York City, New York for cable transfers payable in Renminbi as certified for customs purposes by the Federal Reserve Bank of New York.

"Exchange Offer Registration Statement" means the Exchange Offer Registration Statement as defined in the Registration Rights Agreement.

"Exchange Rate Contract" means, with respect to any Person, any currency swap agreement, forward exchange rate agreement, foreign currency futures or option, exchange rate collar agreement, exchange rate insurance or other agreement, instrument or arrangement or combination thereof entered into in the ordinary course of such Person's business and designed to provide protection for such Person against fluctuations in currency exchange rates.

"Fair Market Value" means, with respect to any property or asset, the price which could be negotiated in an arm's-length free-market transaction, for cash, between a willing seller and a willing buyer, neither of which is under pressure or compulsion to complete the transaction.

"GAAP" or "Generally Accepted Accounting Principles" means generally accepted accounting principles in Hong Kong which are in effect on the date of determination.

"Global Notes" means the Rule 144A Global Notes and the Regulation S Global Notes and, after the Exchange Date, any Note in global form.

"Guarantee" means any obligation, contingent or otherwise, of any Person directly or indirectly guaranteeing any Indebtedness or other obligation of any Person and any obligation, direct or indirect, contingent or otherwise, of such Person (i) to purchase or pay (or advance or supply funds for the purchase or payment of) such Indebtedness or other obligation of such Person (whether arising by virtue of partnership arrangements, or by agreement to keep-well, to purchase assets, goods, securities or services to take-or-pay, or to maintain financial statement conditions or otherwise) or (ii) entered into for purposes of assuring in any other manner an obligee of such Indebtedness or other obligation of the payment thereof or to protect such obligee against loss in respect thereof (in whole or in part). The term "guarantee" used as a verb has a corresponding meaning.

"Holder" means, as of any date of determination (including any record date provided hereunder or fixed pursuant hereto), a Person in whose name a Note is registered in the Note Register at such date of determination.

"Holding Company" means Traffic Stream Infrastructure Holdings Company Limited, a company organized under the law of Bermuda.

"Hong Kong Holding Companies" mean South-East Asia (China) Infrastructure Limited, South-East Asia Strategy Limited, South-East Asia Shao Fu Development Company Limited and Traffic Stream Infrastructure Company Limited.

"Income Tax Expense" means for any period the calculated provision for income taxes of the Company in accordance with

GAAP on a parent company only basis (unconsolidated) together with the provision for income taxes of each of its Subsidiaries, if any, for the same period similarly calculated.

"Incur" means, with respect to any Indebtedness or other obligation of any Person, to create, issue, incur (by conversion, exchange or otherwise), assume, guarantee or otherwise become liable in respect of such Indebtedness or other obligation or the recording, as required pursuant to GAAP or otherwise, of any such Indebtedness or other obligation on the balance sheet of such Person (and "Incurrence", "Incurred", "Incurrable" and "Incurring" shall have meanings correlative to the foregoing); *provided* that (A) any Indebtedness of a Person existing at the time such Person becomes (after the Issue Date) a Subsidiary (whether by merger, consolidation, acquisition or otherwise) of the Company shall be deemed to be incurred by such Subsidiary at the time it becomes a Subsidiary and (B) any amendment, modification or waiver of any document pursuant to which Indebtedness was previously incurred shall be deemed to be an incurrence of Indebtedness unless such amendment, modification or waiver does not increase the principal or premium thereof or interest rate thereon (including by way of original issue discount).

"Indebtedness" means, with respect to any Person, without duplication, (a) all indebtedness of such Person for borrowed money or for the deferred purchase price of property or services (excluding accounts payable and other accrued current liabilities incurred in the ordinary course of business); (b) all other obligations evidenced by a note, bond, debenture or other similar security or Issued under an indenture or other similar agreement; (c) all Capital Lease

Obligations of such Person and any Attributable Indebtedness of such Person; (d) all obligations created or arising under a conditional sale or other title retention agreement with respect to property acquired by such Person (even if the rights and remedies of the seller or lender in the event of default are limited to repossession or sale of the property), but excluding accounts payable and other accrued current liabilities incurred in the ordinary course of business; (e) the full amount of any outstanding letters of credit Issued for the account of such Person; (f) all obligations (in addition to those set forth above) secured by any Lien on any property owned by such Person; (g) any contingent liability of such Person, including guarantees by such Person, in respect of obligations or other liabilities of other Persons of the nature described in the foregoing clauses (a) through (f); (h) all mandatorily redeemable Preferred Stock of such Person valued at the redemption price; (i) all Preferred Stock Issued by any Subsidiary of such Person other than to such Person or a Wholly Owned Subsidiary of such Person, valued at the higher of any mandatory redemption price and the liquidation preference; (j) all principal payment obligations under Interest Rate Contracts of such Person; and (k) any amendment, supplement, modification, deferral, renewal, extension, refunding or restructuring of any liability of the type described in the foregoing clauses (a) through (j) (other than any amendment, supplement, modification, deferral, renewal, extension, refunding, or refinancing as a result of which the related liability would not be treated as Indebtedness).

"Indenture" means this instrument as originally executed and as it may from time to time be supplemented or amended

by one or more indentures supplemental hereto entered into pursuant to the applicable provisions hereof.

"Independent Appraiser" means an internationally recognized appraisal, accounting, investment banking or other firm (which may include the independent registered public accountants of the Company), as appropriate, that (i) is in fact independent in respect of the transaction in question; (ii) is an expert in respect of the relevant valuation or appraisal activity; (iii) does not have any direct financial interest or any material indirect financial interest in the Company or any Subsidiary, the Trustee, the Collateral Agent or in any Affiliate of any of them; and (iv) is not connected with the Company or a Subsidiary, the Trustee, the Collateral Agent or any such Affiliate as a director, officer, employee or Affiliate.

"Initial Notes" has the meaning stated in the first recital of this Indenture.

"Interest Expense" means, for any period, the provision for gross interest expense included in a financial statement prepared in accordance with GAAP (including any amortization of debt discount and debt issuance cost, the interest portion of deferred payment obligations and commissions, discounts and interest with respect to letters of credit but excluding capitalized interest) of the Company and its Subsidiaries for such period, including, without limitation or duplication, (i) the portion of rental obligations (whether or not treated as Capital Lease Obligations) allocable to interest expense in accordance with GAAP; (ii) net fees incurred by the Company or any of its Subsidiaries

with respect to interest rate swap or similar agreements or foreign currency hedge, exchange or similar agreements; and (iii) Preferred Stock and Redeemable Stock dividends declared and payable in cash in respect of Preferred Stock or Redeemable Stock of any Subsidiary held by Persons other than the Company or any of its Wholly Owned Subsidiaries; *provided, however,* that Interest Expense attributable to interest on any Indebtedness bearing a floating interest rate shall be computed on a pro forma basis as if the rate in effect on the date of computation had been the applicable rate for the entire period.

"Interest Payment Date" means May 1 and November 1 of each year, commencing November 1, 1998.

"Interest Rate Agreement" means any interest rate protection agreements and other types of interest rate hedging agreements (including, without limitation, interest rate swaps, caps, floors, collars and similar agreements) designed to protect the Company or any Subsidiary against fluctuations in interest rates in respect of Indebtedness of the Company or any Subsidiary.

"Investment" in any Person means any direct or indirect advance, loan or other extension of credit (including by way of guarantee or similar arrangement) or capital contribution to (by means of any transfer of cash or other property to others or any payment for property or services for the account or use of others), or any purchase or acquisition of Capital Stock, Indebtedness or other similar instruments Issued by such Person.

"Issue" means issue, assume, guarantee, incur or otherwise become liable for; *provided, however,* that any

Indebtedness or Capital Stock of a Person existing at the time such Person becomes a Subsidiary (whether by merger, consolidation, acquisition or otherwise) shall be deemed to be Issued by such Subsidiary at the time it becomes a Subsidiary.

"Issue Date" means the date on which the Notes are originally Issued.

"Joint Venture Contracts" means the following contracts:

(a) the joint venture contract dated October 16, 1996 between Shandong Traffic Development and Investment Company and South-East Asia Strategy Limited for the formation of Shandong Yulin Toll Road Co., Ltd. (for the development of the Yantai-Ninghai section of the Yanwei Highway);

(b) the joint venture contract dated October 16, 1996 between Shandong Traffic Development and Investment Company and South-East Asia (China) Infrastructure Limited for the formation of Shandong Longquan Toll Road Co., Ltd. (for the development of the Ninghai-Weihai section of the Yanwei Highway);

(c) the joint venture contract dated October 16, 1996 between Shandong Traffic Development and Investment Company and Traffic Stream Infrastructure Company Limited for the formation of Shandong Malong Expressway Co., Ltd. (for the development of the Yantai-Zhengezhuang Interchange Bridge section of the Yanwei Expressway);

(d) the joint venture contract dated October 16, 1996 between Shandong Traffic Development and Investment

Company and Traffic Stream Infrastructure Company Limited for the formation of Shandong Xinan Expressway Co., Ltd. (for the development of the Zhengezhuang Interchange Bridge-Xinan River Bridge section of the Yanwei Expressway);

(e) the joint venture contract dated October 16, 1996 between Shandong Traffic Development and Investment Company and South-East Asia Strategy Limited for the formation of Shandong Qinshui Expressway Co., Ltd. (for the development of the Xinan River Bridge-Qinshui River Bridge section of the Yanwei Expressway);

(f) the joint venture contract dated October 16, 1996 between Shandong Traffic Development and Investment Company and South-East Asia Shao Fu Development Company Limited for the formation of Shandong Jinshan Expressway Co., Ltd. (for the development of the Qinshui River Bridge-Jiuguan Interchange Bridge section of the Yanwei Expressway);

(g) the joint venture contract dated October 16, 1996 between Shandong Traffic Development and Investment Company and South-East Asia Shao Fu Development Company Limited for the formation of Shandong Chucun Expressway Co., Ltd. (for the development of the Jiuguan Interchange Bridge-Shuangdao Bridge section of the Yanwei Expressway);

(h) the joint venture contract dated October 16, 1996 between Shandong Traffic Development and Investment Company and South-East Asia (China) Infrastructure Limited for the formation of Shandong Shuangdao Expressway Co.,

Ltd. (for the development of the Shuangdao Bridge-Weihai section of the Yanwei Expressway);

(i) the joint venture contract dated January 8, 1996 between Guangdong Kaiping City Highway Industrial Development Company and South East Asia Estate Investment and Development Co. for the formation of Kaiping City Highway Development Co. Ltd. (for the development of the Shuikou-Chikan section of the Guangzhan Highway);

(j) the joint venture contract dated January 18, 1996 between Guangdong Kaiping City Highway Industrial Development Company and South East Asia Estate Investment and Development Co. for the formation of Kaiping City Communications Development Co. Ltd. (for the development of the Chikan-Puqiao section of the Guangzhan Highway);

(k) the joint venture contract dated January 30, 1996 between Guangdong Shaoguan City Nanjiao Highway Development Center and South East Asia Estate Investment and Development Co. for the formation of Shaoguan City Shaonan Highway Company Limited (for the development of the Shiliting-Shaoguan Smelter section of the Shaonan Highway);

(l) the joint venture contract dated March 14, 1997 among Guangdong Road and Bridge Construction and Development Company, South-East Asia (China) Infrastructure Limited and Guangdong Baolihua Industrial Stock Company Limited for the formation of Guangdong Yuejia Expressway Company Limited (for the development

of the Meinan-Yujiang and Jingyi-Beidou sections of the Meishan Expressway); and

(m) the joint venture contract dated February 13, 1997 between Guangdong Wengyuan Highway Construction Enterprise Company Limited and South-East Asia Strategy Limited for the formation of Guangdong Wengyuan County Guanlong Highway Company Limited (for the development of the Guandu-Wengyuan section of the Guanlong Highway);

in each case as supplemented and amended through the date hereof.

"Joint Venture Distribution Account" shall have the meaning specified in Section 1306.

"Lien" means, with respect to any property or assets, any mortgage or deed of trust, pledge, hypothecation, assignment, deposit agreement, security interest, lien, charge, easement, encumbrance, preference, priority or other similar agreement or rights of others on or with respect to such property or assets (including, without limitation, any conditional sale or other title retention agreement having substantially the same economic effect as any of the foregoing and any power of attorney or similar power given to any Person for the purpose of establishing any such right in the future).

"LOC" means the letter of credit in the amount of US$8,058,750 to be delivered to the Trustee pursuant to the terms of the LOC and Deposit Agreement.

"LOC and Deposit Agreement" means the Letter of Credit Procurement and Deposit Agreement dated as of the

date hereof among the Holding Company, Traffic Stream (China), Mr. Ng Hon Leung, CNMH and the Company.

"Management Services Agreement" means the Management Services Agreement dated as of November 17, 1997 between the Holding Company and Drew Services Limited, as supplemented and amended on April 18, 1998.

"Mandatory Redemption Date" shall have the meaning specified in Section 1307.

"Maturity", when used with respect to any Note, means the date on which the principal of such Note or an installment of principal becomes due and payable as therein or herein provided, whether at the Stated Maturity or by declaration of acceleration, notice of redemption or otherwise.

"Moody's" means Moody's Investors Services, Inc.

"Mortgage of Shares" means the Mortgage of Shares dated as of the Issue Date between the Company and the Collateral Agent.

"Non-Project Spin-off Date" means the first date by which the Company has caused the Hong Kong Holding Companies to transfer their interests in the Non-Project Toll Road Joint Ventures in compliance with applicable law to a Person that is not controlled, directly or indirectly, by the Company.

"Non-Project Toll Road Joint Ventures" means the Guangdong Maozhan Expressway Co. Ltd., and the Hainan Huaizhui Bridge Company Limited.

"Non-Registration Opinion and Supporting Evidence" means an Opinion of Counsel to the effect that, and such other certification or information as the Company may reasonably require to confirm that, a proposed transfer of Notes is being made pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the Securities Act.

"Note Redemption Account" shall have the meaning specified in Section 1307.

"Note Registrar" shall have the meaning specified in Section 305.

"Note Register" shall have the meaning specified in Section 305.

"Notes" has the meaning stated in the first recital of this Indenture and more particularly means any Notes authenticated and delivered under this Indenture.

"Officer's Certificate" means a certificate signed by two authorized officers of the Company, one of whom must be the Chairman or the Secretary of the Company.

"Opinion of Counsel" means a written opinion of counsel, who may be counsel for the Company, including an employee of the Company, and who shall be reasonably acceptable to the Trustee.

"Outstanding", when used with reference to the Notes, shall mean, as of any date of determination, all Notes theretofore authenticated and delivered under this Indenture, except

(a) Notes theretofore canceled by the Trustee or delivered to the Trustee for cancellation;

(b) Notes which have been paid, or Notes in substitution for which other Notes shall have been authenticated and delivered pursuant to the terms of Section 303 (unless proof satisfactory to the Trustee is presented that any of such Notes is held by a Person in whose hands such Note is a legal, valid and binding obligation of the Company); and

(c) Notes, or portions thereof for which payment or redemption money in the necessary amount has been theretofore deposited with the Trustee or any Paying Agent (other than the Company) in trust or set aside and segregated in trust by the Company (if the Company shall act as its own Paying Agent) for the Holders of such Notes, *provided* that, if such Notes are to be redeemed, notice of such redemption has been duly given pursuant to this Indenture or provision therefor satisfactory to the Trustee has been made;

provided, however, that in determining whether the Holders of the requisite principal amount of Outstanding Notes have given any request, demand, authorization, direction, consent, notice or waiver hereunder, and for the purpose of making the calculations required by TIA Section 313, Notes owned by the Company or any other obligor upon the Notes or any Affiliate of the Company or such other obligor shall be disregarded and deemed not to be Outstanding, except that, in determining whether the Trustee shall be protected in making such calculation or in relying upon any such request, demand, authorization, direction, notice, consent or waiver, only Notes which the Trustee knows to be so owned shall be

so disregarded. Notes so owned which have been pledged in good faith may be regarded as Outstanding if the pledgee establishes to the satisfaction of the Trustee the pledgee's right so to act with respect to such Notes and that the pledgee is not the Company or any other obligor upon the Notes or any Affiliate of the Company or such other obligor.

"Paying Agent" means any Person (including the Company acting as Paying Agent) authorized by the Company to pay the principal of (and premium, if any) or interest on any Notes on behalf of the Company.

"Penalty Interest" shall have the meaning specified in Exhibit A hereto.

"Permitted Investments" means (i) any Investment by the Company in any Wholly Owned Subsidiary; (ii) any Investment by the Company in another Person if as a result of such Investment such other Person is merged or consolidated with or into, or transfers or conveys all or substantially all its assets to, the Company; (iii) any Investment in the Company by any Subsidiary; and (iv) Dollar Permitted Investments.

"Permitted Liens" means with respect to any Person:

(a) pledges or deposits made by such Person under workers' compensation, unemployment insurance laws or similar legislation, or good faith deposits in connection with bids, tenders, contracts (other than for payment of Indebtedness) or leases to which such Person is a party, or deposits to secure statutory or regulatory obligations of

such Person or deposits of cash or U.S. Government Obligations to secure surety, appeal or performance bonds to which such Person is a party, or deposits as security for contested taxes or import duties or for the payment of rent, in each case Incurred in the ordinary course of business;

(b) Liens imposed by law such as carriers', warehousemen's and mechanics' Liens, in each case, arising in the ordinary course of business and with respect to amounts not yet due or being contested in good faith by appropriate legal proceedings promptly instituted and diligently conducted and of which a reserve or other appropriate provision, if any, as shall be required in conformity with GAAP shall have been made; or other Liens arising out of judgments or awards against such Person with respect to which such Person shall then be diligently prosecuting appeal or other proceedings for review;

(c) Liens for property taxes not yet subject to penalties for non-payment or which are being contested in good faith and for which appropriate provision, as shall be required in conformity with GAAP, if any, shall have been made;

(d) minor survey exceptions, minor encumbrances, easements or reservations of, or rights of others for, rights of way, electric lines, telegraph and telephone lines and other similar purposes, or zoning or other restrictions as to the use of real properties or liens incidental to the conduct of the business of such Person or to the ownership of its properties which were not Incurred in connection with Indebtedness or other extensions of credit and which do not in the aggregate materially adversely affect the value of said properties or

materially impair their use in the operation of the business of such Person;

(e) Liens existing on the Issue Date;

(f) Liens securing Indebtedness or other obligations of a Subsidiary owing to the Company or a Wholly Owned Subsidiary of the Company;

(g) Liens not in respect of Indebtedness consisting of the interest of the lessor under any lease Incurred in the ordinary course of business and not otherwise prohibited by this Indenture;

(h) Liens which constitute banker's liens, rights of set-off or similar rights and remedies as to deposit accounts or other funds maintained with any bank or other financial institution, whether arising by operation of law or pursuant to contract;

(i) Liens Incurred pursuant to this Indenture and the Security Documents; and

(j) Liens to secure any refinancing, refunding, extension, renewal or replacement (or successive refinances, refunds, extensions, renewals or replacements) as a whole, or in part, of any Indebtedness secured by any Lien referred to in the foregoing clause (e), *provided, however,* that (x) such new Lien shall be limited to all or part of the same property that secured the original Lien (plus improvements on such property) and (y) the Indebtedness secured by such Lien at such time is not increased (other than by an amount necessary

to pay fees and expenses, including premiums, related to the refinancing, refunding, extension, renewal or replacement or such Indebtedness).

"Person" means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization or government or any agency or political subdivision thereof.

"Predecessor Note" of any particular Note means every previous Note evidencing all or a portion of the same debt as that evidenced by such particular Note; and, for the purposes of this definition, any Note authenticated and delivered under Section 308 in exchange for a mutilated security or in lieu of a lost, destroyed or stolen Note shall be deemed to evidence the same debt as the mutilated, lost, destroyed or stolen Note.

"Preferred Stock", as applied to the Capital Stock of any corporation, means Capital Stock or any class or classes (however designated) whether now outstanding or Issued after the Issue Date which is preferred as to the payment of dividends, or as to the distribution of assets upon any voluntary or involuntary liquidation or dissolution of such corporation, over shares of Capital Stock of any other class of such corporation.

"Private Placement Legend" has the meaning set forth in Section 202.

"Project Toll Road Joint Ventures" means Shaoguan Shaonan Highway Company Limited; Shandong Longquan Toll Road Co. Ltd.; Shandong Shuangdao Expressway Co. Ltd.;

Kaiping Communications Development Co. Ltd.; Kaiping Highway Development Co. Ltd.; Guangdong Yuejia Expressway Limited; Shandong Yulin Toll Road Co. Ltd.; Shandong Qinshui Expressway Co. Ltd.; Guan Long Expressway Company Limited; Shandong Chucun Expressway Co. Ltd.; Shandong Jinshan Expressway Co. Ltd.; Shandong Malong Expressway Co. Ltd. and Shandong Xinan Expressway Co. Ltd.

"Purchase Money Indebtedness" of any Person means all obligations of such Person (i) consisting of the deferred purchase price of property, conditional sale obligations, obligations under any title retention agreement (but excluding accounts payable arising in the ordinary course of business) and other purchase money obligations, in each case where the maturity of such obligation does not exceed the anticipated useful life of the asset being financed and (ii) incurred to finance the acquisition of such asset, including additions and improvements.

"QIB" means a "Qualified Institutional Buyer" under Rule 144A.

"Rating Agency" means (i) S&P, (ii) Moody's or (iii) if neither S&P nor Moody's shall make a rating of the Notes publicly available, a nationally recognized statistical rating organization or organizations (as defined under the Exchange Act) selected by the Company which shall be substituted for S&P or Moody's making its rating of the Notes publicly available.

"Rating Confirmation" means, with respect to the Notes, a reconfirmation in writing by a Rating Agency that its rating

of such series of Notes as of the date of such reconfirmation is at least as favorable as its rating of such series of Notes in effect on the Issue Date of the Notes.

"Redeemable Stock" means any Capital Stock that by its terms or otherwise is required to be redeemed on or prior to the Stated Maturity of the Notes or is redeemable at the option of the holder thereof at any time prior to the Stated Maturity of the Notes.

"Redemption Date", when used with respect to any Note to be redeemed, in whole or in part, means the date fixed for such redemption by or pursuant to this Indenture.

"Redemption Price", when used with respect to any Note to be redeemed, means the price at which it is to be redeemed pursuant to this Indenture.

"Refinance" means, in respect of any Indebtedness or Preferred Stock, to refinance, extend, renew, refund, amend, repay, prepay, redeem, decease or retire, or to Issue Indebtedness or Preferred Stock in exchange or replacement for, such Indebtedness or Preferred Stock. "Refinanced" and "Refinancing" shall have correlative meanings.

"Registration Rights Agreement" means the registration rights agreement dated the date hereof between the Company and Merrill Lynch, Pierce, Fenner & Smith Incorporated.

"Registrar" shall mean the The Chase Manhattan Bank and any successor registrar.

"Regular Record Date" for the interest payable on any Interest Payment Date means the April 15 or October 15 (whether or not a Business Day), as the case may be, next preceding such Interest Payment Date.

"Regulation S" means Regulation S under the Securities Act.

"Regulation S Certificate" means a certificate substantially in the form set forth in Exhibit C hereto.

"Regulation S Global Note" means the permanent global Note in definitive, fully registered book-entry form without interest coupons representing the Notes offered and sold in reliance on Regulation S.

"Renminbi" means the lawful currency of the People's Republic of China.

"Responsible Officer", when used with respect to the Trustee, means any vice president, any assistant secretary, any assistant treasurer, any trust officer or assistant trust officer employed by or assigned to the Corporate Trust Office of the Trustee, or any other officer of the Trustee customarily performing functions similar to those performed by any of the above-designated officers, and also means, with respect to a particular corporate trust matter, any other officer to whom such matter is referred because of his knowledge of and familiarity with the particular subject.

"Restricted Payment" means, with respect to any Person, (i) any declaration or payment of any dividend on, or distribution to the holders of, any shares of Capital Stock

of such Person or any Subsidiary of such Person; (ii) any purchase, redemption or other acquisition or retirement for consideration of any share of Capital Stock (other than Redeemable Stock) of such Person or any Subsidiary of such Person or any option, warrant or other right to acquire Capital Stock of such Person or any Subsidiary of such Person; (iii) any prepayment, purchase, redemption or other acquisition or retirement for consideration of any Subordinated Indebtedness of such Person prior to a scheduled mandatory sinking fund payment day or maturity date thereof; (iv) any incurrence, creation or assumption of any guarantee of Indebtedness of any Affiliate of such Person (other than Permitted Investments); or (v) any Investment in any Person (other than Permitted Investments).

"Restricted Subsidiary" means any of the Project Toll Road Joint Ventures and any of the Hong Kong Holding Companies.

"Rule 144A Information" shall have the meaning specified in Section 1009(c).

"Rule 144A Certificate" means a certificate substantially in the form set forth in Exhibit B hereto.

"Rule 144A Global Note" means the permanent global Note in definitive, fully registered book-entry form without interest coupons representing the Notes offered and sold in reliance on Rule 144A under the Securities Act.

"S&P" means Standard and Poor's Rating Services.

"Sale/Leaseback Transaction" means any arrangement with any Person pursuant to which property is sold or

transferred by such Person and such property or substantially identical property is, in a substantially contemporaneous transaction, leased back from the purchaser or transferee thereof by such Person or one of its Subsidiaries.

"Security Documents" means, collectively, the Mortgage of Shares, the Assignment of Receivables, the Service Fee Pledge Agreement and the Collateral Assignment Agreements.

"Senior Indebtedness" means, at any time, any outstanding Indebtedness of the Company that is *pari passu* in right of payment with the Notes.

"Service Fee Pledge Agreement" means the Service Fee Pledge Agreement dated as of the date hereof between Drew Services Limited and the Collateral Agent.

"Special Interest" shall have the meaning specified in Exhibit A hereto.

"Special Record Date" for the payment of any Defaulted Interest means a date fixed by the Trustee pursuant to Section 309.

"Stated Maturity" means, with respect to any Indebtedness, the date specified in respect of such Indebtedness as the fixed date on which the principal of such Indebtedness is due and payable, including pursuant to any mandatory redemption provision (but excluding any provision providing for the repurchase of such Indebtedness at the option of the holder thereof upon the happening of any contingency unless such contingency has occurred).

"Subordinated Indebtedness" means Indebtedness of the Company the principal of and any premium and interest on which is by its terms subordinated in right of payment to the principal of and premium, if any, and interest, including Additional Interest, if any, on the Notes.

"Subsidiary" means, with respect to any Person, any corporation, association, partnership, joint venture or other business entity, of which more than 50% of the total voting power of shares of Capital Stock or other interests (including partnership interests) entitled (without regard to the occurrence of any contingency) to vote in the election of commissioners, directors, managers, trustees or similar officials thereof is at the time owned or controlled, directly or indirectly, by (i) such Person, (ii) such Person and one or more Subsidiaries, or (iii) one or more Subsidiaries. For the avoidance of doubt, with respect to the Company, "Subsidiary" also means each of the Project Toll Road Joint Ventures and, until such time as a Non-Project Toll Road Joint Venture is transferred in accordance with Section 1023, such Non-Project Toll Road Joint Venture.

"Toll Road Joint Ventures" means each of the Project Toll Road Joint Ventures and the Non-Project Toll Road Joint Ventures.

"Toll Roads Under Development" means (i) the Guanlong Highway, a 32.1 kilometer toll road located in Guangdong Province and which, as of the date hereof, is owned and to be operated by the Guan Long Highway Company Limited, and (ii) the Meishan Expressway, a 28.7 kilometer toll road in Guangdong Province and which, as of the date hereof, is owned and to be operated by Guangdong Yuejia Expressway Limited.

"Traffic Stream (China)" means Traffic Stream (China) Infrastructure Company Limited, a company organized under the law of the British Virgin Islands.

"Trust Indenture Act" or "TIA" means the Trust Indenture Act of 1939 as in force at the date as of which this Indenture was executed, except as provided in Section 905.

"Trustee" means the Person named as the "Trustee" in the first paragraph of this Indenture until a successor Trustee shall have become such pursuant to the applicable provisions of this Indenture, and thereafter "Trustee" shall mean such successor Trustee.

"U.S. Dollar" means the lawful currency of the United States of America.

"U.S. GAAP" means generally accepted accounting principles, consistently applied, that are set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other entity as may be approved by a significant segment of the accounting profession in the United States of America.

"US Government Obligations" means direct obligations (or certificates representing an ownership interest in such obligations) of the United States of America (including any agency or instrumentality thereof) for the payment of which the full faith and credit of the United States of America is pledged.

"Voting Stock" of a corporation or other entity means all classes of Capital Stock of such corporation or other entity then outstanding and normally entitled to vote in the election of commissioners or directors, or in the election of Persons substantially performing the functions of directors of a U.S. corporation, or in the appointment of a general partner or other managing authority.

"Wholly Owned Subsidiary" means, with respect to any Person, a Subsidiary all the Capital Stock of which (other than directors' qualifying shares) is owned or controlled by such Person or another Wholly Owned Subsidiary.

"Yanwei Highway" means the 88-kilometer toll road located in Shandong Province which, as of the date hereof, is owned and operated by Shandong Longquan Toll Road Co., Ltd. and Shandong Yulin Toll Road Co. Ltd.

"1999 Devaluation" means a reduction by 5% or more as between (i) the average Exchange Rates in effect on the last Business Day of each month in 1999 and (ii) the Exchange Rate in effect on the first Business Day in 2000.

"2000 Devaluation" means a reduction by 5% or more as between (i) the average Exchange Rates in effect on the last Business Day of each month in 2000 and (ii) the Exchange Rate in effect on the first Business Day in 2001.

SECTION 102. *Compliance Certificates and Opinions.*

Upon any application or request by the Company to the Trustee to take any action under any provision of this

Indenture, the Company shall furnish to the Trustee an Officer's Certificate in form reasonably acceptable to the Trustee stating that all conditions precedent, if any, provided for in this Indenture (including any covenant compliance with which constitutes a condition precedent) relating to the proposed action have been complied with and, if expressly required by the terms hereof, an Opinion of Counsel stating that in the opinion of such counsel all such conditions precedent, if any, have been complied with, except that in the case of any such application or request as to which the furnishing of such documents is specifically required by any provision of this Indenture relating to such particular application or request, no additional certificate or opinion need be furnished.

Every certificate or opinion with respect to compliance with a condition or covenant provided for in this Indenture (other than pursuant to Section 1008(a)) shall include:

(1) a statement that each individual signing such certificate or opinion has read such covenant or condition and the definitions herein relating thereto;

(2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based;

(3) a statement that, in the opinion of each such individual, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with; and

(4) a statement as to whether, in the opinion of each such individual, such condition or covenant has been complied with.

SECTION 103. *Form of Documents Delivered to Trustee.*

In any case where several matters are required to be certified by any specified Person, it is not necessary that all such matters be certified by only one such Person, or that they be so certified by only one document, but one such Person may certify with respect to some matters and one or more other such Persons as to other matters, and any such Person may certify as to such matters in one or several documents.

Any certificate of an officer of the Company may be based, insofar as it relates to legal matters, upon a certificate or opinion of, or representations by, counsel, unless such officer knows, or in the exercise of reasonable care should know, that the certificate or opinion or representations with respect to the matters upon which the certificate of such officer is based are erroneous. Any Opinion of Counsel delivered to the Trustee in connection with this Indenture may be based, insofar as it relates to factual matters, upon a certificate or representations by, an officer or officers of the Company stating that the information with respect to such factual matters is in the possession of the Company, unless such counsel knows, or in the exercise of reasonable care should know, that the certificate or opinion or representations with respect to such matters are erroneous.

Where any Person is required to make, give or execute two or more applications, requests, consents, certificates,

statements, opinions or other instruments under this Indenture, they may, but need not, be consolidated and form one instrument.

All notices, reports, certificates and communications hereunder shall be made in the English language or shall be accompanied by a certified English translation thereof. Any certified English translation delivered hereunder shall be a true and accurate translation by a professionally qualified translator or by some other person qualified to do so.

SECTION 104. *Acts of Holders*.

(a) Any request, demand, authorization, direction, notice, consent, waiver or other action provided by this Indenture to be given or taken by Holders may be embodied in and evidenced by one or more instruments of substantially similar tenor signed by such Holders in person or by agents duly appointed in writing; and, except as herein otherwise expressly provided, such action shall become effective when such instrument or instruments are delivered to the Trustee and, where it is hereby expressly required, to the Company. Such instrument or instruments (and the action embodied therein and evidenced thereby) are herein sometimes referred to as the "Act" of the Holders signing such instrument or instruments. Proof of execution of any such instrument or of a writing appointing any such agent shall be sufficient for any purpose of this Indenture and conclusive in favor of the Trustee and the Company, if made in the manner provided in this Section 104.

(b) The fact and date of the execution by any Person of any such instrument or writing may be proved by the affidavit

of a witness of such execution or by a certificate of a notary public or other officer authorized by law to take acknowledgments of deeds, certifying that the individual signing such instrument or writing acknowledged to him the execution thereof. Where such execution is by a signer acting in a capacity other than his individual capacity, such certificate or affidavit shall also constitute sufficient proof of authority. The fact and date of the execution of any such instrument or writing, or the authority of the Person executing the same, may also be proved in any other manner that the Trustee deems sufficient.

(c) The principal amount and serial numbers of Notes held by any Person, and the date of holding the same, shall be proved by the Note Register.

(d) If the Company shall solicit from the Holders of Notes any request, demand, authorization, direction, notice, consent, waiver or other Act, the Company may, at its option, by or pursuant to a Board Resolution, fix in advance a record date for the determination of Holders entitled to give such request, demand, authorization, direction, notice, consent, waiver or other Act, but the Company shall have no obligation to do so. Notwithstanding TIA Section 316(c), such record date shall be the record date specified in or pursuant to such Board Resolution, which shall be a date not earlier than the date 30 days prior to the first solicitation of Holders generally in connection therewith and not later than the date such solicitation is completed. If such a record date is fixed, such request, demand, authorization, direction, notice, consent, waiver or other Act may be given before or after such record date, but only the Holders of record at the close of business

on such record date shall be deemed to be Holders for the purposes of determining whether Holders of the requisite proportion of Outstanding Notes have authorized or agreed or consented to such request, demand, authorization, direction, notice, consent, waiver or other Act, and for that purpose the Outstanding Notes shall be computed as of such record date; *provided* that no such authorization, agreement or consent by the Holders on such record date shall be deemed effective unless it shall become effective pursuant to the provisions of this Indenture not later than eleven months after the record date.

(e) Any request, demand, authorization, direction, notice, consent, waiver or other Act of the Holder of any Note shall bind every future Holder of the same Note and the Holder of every Note issued upon the registration of transfer thereof or in exchange therefor or in lieu thereof in respect of anything done, omitted or suffered to be done by the Trustee or the Company in reliance thereon, whether or not notation of such action is made upon such Note.

SECTION 105. *Notices, Etc., to Trustee and the Company.*

Any request, demand, authorization, direction, notice, consent, waiver or Act of Holders or other document provided or permitted by this Indenture to be made upon, given or furnished to, or filed with,

(1) the Trustee by any Holder or by the Company shall be sufficient for every purpose (unless otherwise herein expressly provided) hereunder if made, given, furnished or filed in

writing to or with the Trustee at its Corporate Trust Office, Attention: Global Trust Services, or

(2) the Company or by the Trustee or by any Holder shall be sufficient for every purpose hereunder (unless otherwise herein expressly provided) if in writing and mailed, first-class postage prepaid, to the Company addressed to it at the address of its principal office specified in the first paragraph of this Indenture, or at any other address previously furnished in writing to the Trustee by the Company.

SECTION 106. *Notice to Holders; Waiver.*

Where this Indenture provides for notice of any event to Holders by the Company or the Trustee, such notice shall be sufficiently given (unless otherwise herein expressly provided) if in writing and mailed, first-class postage prepaid, to each Holder affected by such event, at its address as it appears in the Note Register, in each case not later than the latest date, and not earlier than the earliest date, prescribed hereunder for the giving of such notice and additionally notified by the Company or by the Trustee at the written direction of the Company in the manner and within the terms set forth below. In any case where notice to Holders is given by mail, neither the failure to mail such notice, nor any defect in any notice so mailed, to any particular Holder shall affect the sufficiency of such notice with respect to other Holders. Any notice mailed to a Holder in the manner herein prescribed shall be conclusively deemed to have been received by such Holder, whether or not such Holder actually receives such

notice. Where this Indenture provides for notice in any manner, such notice may be waived in writing by the Person entitled to receive such notice, either before or after the event, and such waiver shall be the equivalent of such notice. Waivers of notice by Holders shall be filed with the Trustee, but such filing shall not be a condition precedent to the validity of any action taken in reliance upon such waiver.

In case by reason of the suspension of or irregularities in regular mail service or by reason of any other cause, it shall be impracticable to mail notice of any event to Holders when such notice is required to be given pursuant to any provision of this Indenture, then any manner of giving such notice as shall be satisfactory to the Trustee shall be deemed to be a sufficient giving of such notice for every purpose hereunder.

SECTION 107. *Effect of Headings and Table of Contents.*

The Article and Section headings herein and the Table of Contents are for convenience only and shall not affect the construction hereof.

SECTION 108. *Successors and Assigns.*

All covenants and agreements in this Indenture by the Company shall bind its successors and assigns, whether so expressed or not.

SECTION 109. *Separability Clause.*

In case any provision in this Indenture or in the Notes shall be invalid, illegal or unenforceable, the validity, legality

and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

SECTION 110. *Benefits of Indenture.*

Nothing in this Indenture or in the Notes, express or implied, shall give to any Person, other than the parties hereto, any Paying Agent, any Note Registrar and their successors hereunder and the Holders of any benefit or any legal or equitable right, remedy or claim under this Indenture.

SECTION 111. *Governing Law.*

THIS INDENTURE AND THE NOTES SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK.

SECTION 112. *Consent to Jurisdiction and Service of Process.*

(a) The Company irrevocably submits to the jurisdiction of any court of the State of New York or any United States federal court sitting in the Borough of Manhattan, New York City, New York, United States, and any appellate court from any thereof, and waives any immunity from the jurisdiction of such courts over any suit, action or proceeding that may be brought in connection with this Indenture or the Notes. The Company irrevocably waives, to the fullest extent permitted by law, any objection to any suit, action, or proceeding that may be brought in connection with this Indenture or the Notes, including such actions, suits or proceedings relating to securities laws of the United States

of America or any state thereof, in such courts whether on the grounds of venue, residence or domicile or on the ground that any such suit, action or proceeding has been brought in an inconvenient forum. The Company agrees that final judgment in any such suit, action or proceeding brought in such court shall be conclusive and binding upon the Company and may be enforced in any court to the jurisdiction of which the Company is subject by a suit upon such judgment.

(b) The Company agrees that service of all writs, process and summonses in any suit, action or proceeding brought in connection with this Indenture or the Notes against the Company in any court of the State of New York or any United States federal court sitting in the Borough of Manhattan, New York City may be made upon CT Corporation System at 1633 Broadway, New York, New York 10019, whom the Company irrevocably appoints as its authorized agent for service of process. The Company represents and warrants that CT Corporation System has agreed to act as the agent for service of process for the Company. The Company agrees that such appointment shall be irrevocable so long as any of the Notes remain Outstanding or until the irrevocable appointment by the Company of a successor in The City of New York as its authorized agent for such purpose and the acceptance of such appointment by such successor. The Company further agrees to take any and all action, including the filing of any and all documents and instruments, that may be necessary to continue such appointment in full force and effect as aforesaid. If CT Corporation System shall cease to act as the agent for service of process for the Company, the Company shall appoint without delay another such agent and provide prompt written notice to the Trustee of such

appointment. With respect to any such action in any court of the State of New York or any United States federal court in the Borough of Manhattan, New York City, service of process upon CT Corporation System, as the authorized agent of the Company for service of process, and written notice of such service to the Company shall constitute personal service of process upon the Company.

(c) Nothing in this Section shall affect the right of any party to serve legal process in any other manner permitted by law or affect the right of any party to bring any action or proceeding against any other party or its property in the courts of other jurisdictions.

SECTION 113. *Legal Holidays*.

In any case where any Interest Payment Date, Mandatory Redemption Date or any date established for the payment of Defaulted Interest pursuant to Section 309 or Redemption Date or Stated Maturity or Maturity of any Note shall not be a Business Day, then (notwithstanding any other provision of this Indenture or of the Notes) payment of principal or premium, if any, or interest, including Additional Interest, if any, or Additional Amounts, if any, need not be made on such date, but may be made on the next succeeding Business Day with the same force and effect as if made on the Interest Payment Date, Mandatory Redemption Date, or date established for payment of Defaulted Interest pursuant to Section 309, Redemption Date or at the Stated Maturity or Maturity; *provided* that no interest shall accrue for the period from and after such Interest Payment Date, Mandatory Redemption Date or date established for payment of

Defaulted Interest pursuant to Section 309, Redemption Date, Stated Maturity or Maturity, as the case may be.

SECTION 114. *Rules by Trustee, Paying Agent or Registrar.*

The Trustee may make reasonable rules for action by or at a meeting of Holders and the Paying Agent or Registrar may make reasonable rules for its functions, in each case, not inconsistent with the provisions of this Indenture and the Notes.

SECTION 115. *Incorporation by Reference of Trust Indenture Act.*

Whenever this Indenture refers to a provision of the TIA, the provision is incorporated by reference in and made a part of this Indenture. The following TIA terms used in this Indenture have the following meanings:

"indenture notes" means the Notes;

"indenture note holder" means a Holder;

"indenture trustee" or "institutional trustee" means the Trustee; and

"obligor" on the indenture notes means the Company or any other successor obligor on the Notes.

All other TIA terms used in this Indenture that are defined by the TIA, defined by reference in the Trust Indenture Act

to another statute or defined by a rule of the Commission and not otherwise defined herein shall have the meanings assigned to them therein.

ARTICLE TWO

NOTE FORMS

SECTION 201. *Forms Generally.*

The Notes shall be known as the "141¼% Senior Secured Notes due 2006" of the Company. The Initial Notes and the Exchange Notes will be considered collectively to be a single class for all purposes under this Indenture, including, without limitation, waivers, amendments, redemptions and offers to purchase. The Notes and the Trustee's certificate of authentication shall be in substantially the forms set forth in this Article, with such appropriate insertions, omissions, substitutions and other variations as are required by law or permitted by this Indenture, and may have such letters, notations, numbers or other marks of identification and such legends or endorsements placed thereon as the Company may deem appropriate (and as not prohibited by the terms of this Indenture) or as may be required or appropriate to comply with any law or with the rules of any securities exchange on which such Notes may be listed, or to conform to general usage, or as may, consistently herewith, be determined by the officers executing such Notes, as evidenced by their execution of the Notes. Each Note shall be dated the date of its authentication. Any portion of the text of any Note may be set forth on the reverse thereof, with an appropriate reference thereto on the face of the Note.

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The Global Notes shall be printed, lithographed or engraved on steel-engraved borders or may be produced in any other manner permitted by the rules under any applicable securities laws or any securities exchange on which the Notes may be listed, all as determined by the officers of the Company executing such Notes, as evidenced by their execution of such Notes.

Initial Notes offered and sold in reliance on Rule 144A may be issued in the form of a Rule 144A Global Note in registered form, substantially in the form set forth in Exhibit A deposited with the Trustee, as custodian for the Depositary, duly executed by the Company and authenticated by the Trustee as hereinafter provided. The outstanding aggregate principal amount of the Rule 144A Global Note may from time to time be increased or decreased by adjustments made on the records of the Trustee, as custodian for the Depositary or its nominee, as hereinafter provided.

Initial Notes offered and sold in offshore transactions in reliance on Regulation S shall be initially issued in the form of a Regulation S Global Note in registered form, substantially in the form set forth in Exhibit A deposited with the Trustee, as custodian for the Depositary, duly executed by the Company and authenticated by the Trustee as hereinafter provided. The aggregate outstanding principal amount of the Regulation S Global Note may from time to time be increased or decreased by adjustments made in the records of the Trustee, as custodian for the Depositary or its nominee, as herein provided.

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SECTION 202. *Private Placement Legend.*

Unless and until (i) an Initial Note is sold under an effective Registration Statement or (ii) an Initial Note is exchanged for an Exchange Note in connection with an effective Registration Statement, in each case pursuant to the Registration Rights Agreement, each Rule 144A Global Note shall bear the following legend set forth below (the "Private Placement Legend") on the face thereof.

THIS NOTE HAS NOT BEEN REGISTERED UNDER THE UNITED STATES SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT") OR THE SECURITIES LAWS OF ANY STATE AND ACCORDINGLY, MAY NOT BE OFFERED OR SOLD WITHIN THE UNITED STATES OR TO, OR FOR THE ACCOUNT OR BENEFIT OF U.S. PERSONS EXCEPT AS SET FORTH IN THE FOLLOWING SENTENCE. THE HOLDER HEREOF, BY ACCEPTANCE OF THIS NOTE, AGREES FOR THE BENEFIT OF TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED (THE "ISSUER") THAT THIS NOTE MAY BE OFFERED, RESOLD, PLEDGED OR OTHERWISE TRANSFERRED ONLY: (1) TO THE ISSUER OR ANY AFFILIATE THEREOF, (2) TO A PERSON WHOM THE HOLDER REASONABLY BELIEVES IS A QUALIFIED INSTITUTIONAL BUYER, AS DEFINED IN RULE 144A UNDER THE SECURITIES ACT ("RULE 144A"), THAT IS PURCHASING FOR ITS OWN ACCOUNT OR

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FOR THE ACCOUNT OF A QUALIFIED INSTITUTIONAL BUYER TO WHOM NOTICE IS GIVEN THAT THE TRANSFER IS BEING MADE IN RELIANCE ON RULE 144A AS INDICATED BY THE BOX CHECKED BY THE HOLDER ON THE REVERSE OF THIS NOTE, (3) IN AN OFFSHORE TRANSACTION IN ACCORDANCE WITH REGULATION S UNDER THE SECURITIES ACT, (4) PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE SECURITIES ACT PURSUANT TO RULE 144 THEREUNDER (IF AVAILABLE) OR (5) PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT, IN EACH CASE IN ACCORDANCE WITH ANY APPLICABLE SECURITIES LAWS OF ANY STATE OF THE UNITED STATES OR ANY OTHER JURISDICTION AND SUBJECT TO THE ISSUER'S RIGHT PRIOR TO ANY OFFER, RESALE OR TRANSFER PURSUANT TO CLAUSE (4) ABOVE, TO REQUIRE DELIVERY OF ANY OPINION OF COUNSEL, CERTIFICATION AND/OR OTHER INFORMATION SATISFACTORY TO THE ISSUER, AND IN EACH OF THE FOREGOING CASES, TO REQUIRE THAT A CERTIFICATE OF TRANSFER IN THE FORM APPEARING ON THE OTHER SIDE OF THIS NOTE BE COMPLETED AND DELIVERED BY THE HOLDER TO THE TRUSTEE. THIS LEGEND MAY BE REMOVED AFTER THE EXPIRATION OF TWO YEARS FROM THE

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LATER OF (I) THE DATE OF ORIGINAL ISSUANCE OF THE NOTE EVIDENCED HEREBY, OR (II) THE LAST DAY ON WHICH THE ISSUER OR ANY AFFILIATE OF THE ISSUER WAS THE OWNER OF THE NOTE EVIDENCED HEREBY (OR OF ANY PREDECESSOR OF SUCH NOTE).

Each Global Note, whether or not an Initial Note, shall also bear the following legend on the face thereof:

UNLESS THIS GLOBAL NOTE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY, A NEW YORK CORPORATION ("DTC"), TO THE COMPANY OR ITS AGENT FOR REGISTRATION OF TRANSFER, EXCHANGE, OR PAYMENT, AND ANY GLOBAL NOTE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR IN SUCH OTHER NAME AS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC (AND ANY PAYMENT IS MADE TO CEDE & CO. OR SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC), ANY TRANSFER, PLEDGE OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL INASMUCH AS THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.

TRANSFERS OF THIS GLOBAL NOTE SHALL BE LIMITED TO TRANSFERS IN WHOLE,

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BUT NOT IN PART, TO DTC OR NOMINEES OF DTC OR TO A SUCCESSOR OF DTC OR SUCH SUCCESSOR'S NOMINEE AND TRANSFERS OF PORTIONS OF THIS GLOBAL NOTE SHALL BE LIMITED TO TRANSFERS MADE IN ACCORDANCE WITH THE RESTRICTIONS SET FORTH IN SECTIONS 306 AND 307 OF THE INDENTURE.

ARTICLE THREE

THE NOTES

SECTION 301. *Title and Terms.*

The aggregate principal amount of Notes which may be authenticated and delivered under this Indenture is limited to US$119,000,000, except for Notes authenticated and delivered upon registration of transfer of, or in exchange for, or in lieu of, other Notes pursuant to Section 304, 305, 306, 307, 906 or 1015.

The Notes shall be known and designated as the "14¼% Senior Secured Notes due 2006" of the Company. Their Stated Maturity shall be May 1, 2006 and, except as otherwise set forth herein they shall bear interest at the rate of 14¼% per annum from May 6, 1998, or from the most recent Interest Payment Date to which interest has been paid or duly provided for, payable on May 1 and November 1 in each year commencing November 1, 1998 and at said Stated Maturity, until the principal thereof is paid or duly provided for.

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The principal of, premium (if any) interest, including Additional Interest, if any, on and Additional Amounts, if any, and any other amounts due hereunder or under the Notes shall be payable at the office or agency of the Trustee maintained for such purpose in The City of New York, or at such other Paying Agent as the Company may appoint; *provided, however,* that, at the option of the Company, interest may be paid by check mailed to addresses of the Persons entitled thereto as such addresses shall appear on the Note Register.

The Notes shall be redeemable as provided in Article Eleven.

SECTION 302. *Denominations.*

The Notes shall be issuable only in registered form without coupons and only in denominations of US$1,000 and any integral multiple thereof.

SECTION 303. *Execution, Authentication, Delivery and Dating.*

The Notes shall be executed on behalf of the Company by its Chairman or any Director, under its corporate seal reproduced thereon, if any, and attested by its Secretary or an Assistant Secretary. The signature of any of these officers on the Notes may be manual or facsimile signatures of the present or any future such authorized officer and may be imprinted or otherwise reproduced on the Notes.

Notes bearing the manual or facsimile signatures of individuals who were at any time the proper officers of the

Company shall bind the Company, notwithstanding that such individuals or any of them have ceased to hold such offices prior to the authentication and delivery of such Notes or did not hold such offices at the date of such Notes.

At any time and from time to time after the execution and delivery of this Indenture, the Company may deliver Notes executed by the Company to the Trustee for authentication by the Authenticating Agent, together with a Company Order for the authentication and delivery of such Notes, and the Authenticating Agent in accordance with such Company Order shall authenticate and deliver such Notes.

Each Note shall be dated the date of its authentication.

No Note shall be entitled to any benefit under this Indenture or be valid or obligatory for any purpose unless there appears on such Note a certificate of authentication substantially in the form provided for herein duly executed by the Authenticating Agent by manual signature of an authorized officer, and such certificate upon any Note shall be conclusive evidence, and the only evidence, that such Note has been duly authenticated and delivered hereunder and is entitled to the benefits of this Indenture.

In case the Company, pursuant to Article Eight, shall be consolidated or merged with or into any other Person or shall convey, transfer, lease or otherwise dispose of its properties and assets substantially as an entirety to any Person, and the successor Person resulting from such consolidation, or surviving such merger, or into which the Company shall have been merged, or the Person which shall have received a conveyance, transfer, lease or other disposition as aforesaid,

shall have executed an indenture supplemental hereto with the Trustee pursuant to Article Eight, any of the Notes authenticated or delivered prior to such consolidation, merger, conveyance, transfer, lease or other disposition may, from time to time, at the request of the successor Person, be exchanged for other Notes executed in the name of the successor Person with such changes in phraseology and form as may be appropriate, but otherwise in substance of like tenor as the Notes surrendered for such exchange and of like principal amount; and the Trustee, upon Company Request of the successor Person, shall authenticate and deliver Notes as specified in such request for the purpose of such exchange. If Notes shall at any time be authenticated and delivered in any new name of a successor Person pursuant to this Section in exchange or substitution for or upon registration of transfer of any Notes, such successor Person, at the option of the Holders but without expense to them, shall provide for the exchange of all Notes at the time outstanding for Notes authenticated and delivered in such new name.

SECTION 304. *Temporary Notes*.

Pending the preparation of definitive Notes, the Company may execute, and upon a Company Order the Trustee shall authenticate and deliver, temporary Notes which are printed, lithographed, typewritten, mimeographed or otherwise produced, in any authorized denomination, substantially of the tenor of the definitive Notes in lieu of which they are issued and with such appropriate insertions, omissions, substitutions and other variations as the officers executing such Notes may determine, as conclusively evidenced by their execution of such Notes.

If temporary Notes are issued, the Company will cause definitive Notes to be prepared without unreasonable delay. After the preparation of definitive Notes, the temporary Notes shall be exchangeable for definitive Notes upon surrender of the temporary Notes at the office or agency of the Company designated for such purpose pursuant to Section 1002, without charge to the Holder. Upon surrender for cancellation of any one or more temporary Notes, the Company shall execute and the Trustee shall authenticate and deliver in exchange therefor a like principal amount of definitive Notes of authorized denominations. Until so exchanged, the temporary Notes shall in all respects be entitled to the same benefits under this Indenture as definitive Notes.

SECTION 305. *Registration, Registration of Transfer and Exchange.*

The Company shall cause to be kept at the Corporate Trust Office of the Trustee a register (the register maintained in such office and in any other office or agency designated pursuant to Section 1002 being herein sometimes referred to as the "Note Register") in which, subject to such reasonable regulations as it may prescribe, the Company shall provide for the registration of Notes and of transfers of Notes. The Note Register shall be in written form or any other form capable of being converted into written form within a reasonable time. At all reasonable times, the Note Register shall be open to inspection by the Trustee. The Trustee is hereby initially appointed as note registrar (the "Note Registrar") for the purpose of registering Notes and transfers of Notes as herein provided.

Upon surrender for registration of transfer of any Note at the office or agency of the Company designated pursuant to Section 1002, the Company shall execute, and the Trustee shall authenticate and deliver, in the name of the designated transferee or transferees, one or more new Notes of any authorized denomination or denominations of a like aggregate principal amount.

At the option of the Holder, Notes may be exchanged for other Notes of any authorized denomination and of a like aggregate principal amount, upon surrender of the Notes to be exchanged at such office or agency. Whenever any Notes are so surrendered for exchange (including an exchange of Initial Notes for Exchange Notes), the Company shall execute, and the Trustee shall authenticate and deliver, the Notes which the Holder making the exchange is entitled to receive, *provided* that no exchange of Initial Notes for Exchange Notes shall occur until an Exchange Offer Registration Statement shall have been declared effective by the Commission, the Trustee shall have received a Company Request directing such exchange and the Initial Notes to be exchanged for the Exchange Notes shall be cancelled by the Trustee.

All Notes issued upon any registration of transfer or exchange of Notes shall be the valid obligations of the Company, evidencing the same debt, and entitled to the same benefits under this Indenture, as the Notes surrendered upon such registration of transfer or exchange.

Every Note presented or surrendered for registration of transfer or for exchange shall (if so required by the Company

or the Note Registrar) be duly endorsed, or be accompanied by a written instrument of transfer, in form satisfactory to the Company and the Note Registrar, duly executed by the Holder thereof or his attorney duly authorized in writing.

No service charge shall be made for any registration of transfer or exchange or redemption of Notes, but the Company may require payment of a sum sufficient to cover any tax or other governmental charge that may be imposed in connection with any registration of transfer or exchange of Notes, other than exchanges pursuant to Section 304, 906, 1015 or 1105(4) not involving any transfer.

The Company shall not be required (i) to issue, register the transfer of or exchange any Note during a period beginning at the opening of business 15 days before the selection of Notes to be redeemed under Section 1104 and ending at the close of business on the day of such mailing of the relevant notice of redemption, or (ii) to register the transfer of or exchange any Note so selected for redemption in whole or in part, except the unredeemed portion of any Note being redeemed in part.

SECTION 306. *Kook-Entry Provisions for Global Notes.*

(a) Each Global Note initially shall (i) be registered in the name of the Depositary for such Global Note or the nominee of such Depositary, (ii) be delivered to the Trustee as custodian for such Depositary and (iii) bear legends (as applicable) as set forth in Section 202.

Members of, or participants in, the Depositary ("Agent Members") shall have no rights under this Indenture

with respect to any Global Note held on their behalf by the Depositary, or the Trustee as its custodian, or under any Global Note, and the Depositary may be treated by the Company, the Trustee and any agent of the Company or the Trustee as the absolute owner of such Global Note for all purposes whatsoever. Notwithstanding the foregoing, nothing herein shall prevent the Company, the Trustee or any agent of the Company or the Trustee from giving effect to any written certification, proxy or other authorization furnished by the Depositary or impair, as between the Depositary and its Agent Members, the operation of customary practices governing the exercise of the rights of a beneficial owner of any Note.

(b) Transfers of a Global Note shall be limited to transfers of such Global Note in whole, but not in part, to the Depositary, its successors or their respective nominees and, in part, in the circumstances described in paragraph (d) hereof. Interests of beneficial owners in a Global Note may be transferred in accordance with the applicable rules and procedures of the Depositary and the provisions of Section 307. Certificated Notes shall be transferred to all beneficial owners in exchange for their beneficial interests in the Global Notes, if (i) the Depositary notifies the Company that it is unwilling or unable to continue as Depositary for the Global Notes, or the Depositary ceases to be a "Clearing Agency" registered under the Exchange Act and a successor depositary is not appointed by the Company within 90 days, (ii) an Event of Default has occurred and Holders of more than 25% in aggregate principal amount of the Notes at the time Outstanding represented by the Global Notes advise the Trustee through the Depositary in writing that the continuation of a book-entry system through the

Depositary with respect to the Global Notes is no longer required or (iii) the Company determines not to have the Notes so registered by Global Notes.

(c) Any beneficial interest in one of the Global Notes that is transferred to a person who takes delivery in the form of an interest in the other Global Note will, upon transfer, cease to be an interest in such Global Note and become an interest in the other Global Note and, accordingly, will thereafter be subject to all transfer restrictions, if any, and other procedures applicable to beneficial interests in such other Global Note for as long as it remains such an interest.

(d) In connection with the transfer of the entire Rule 144A Global Note or Regulation S Global Note to beneficial owners pursuant to paragraph (b) of this Section, the Rule 144A Global Note or Regulation S Global Note, as the case may be, shall be deemed to be surrendered to the Trustee for cancellation, and the Company shall execute, and the Trustee shall authenticate and deliver, to each beneficial owner identified by the Depositary in exchange for its beneficial interest in the Rule 144A Global Note or Regulation S Global Note, as the case may be, an equal aggregate principal amount of Certificated Notes, of authorized denominations.

(e) Any Certificated Note delivered in exchange for an interest in the Rule 144A Global Note pursuant to paragraph (b) of this Section shall, except as otherwise provided by paragraph (a)(i) of Section 307, bear the Private Placement Legend.

(f) The Holder of a Global Note may grant proxies and otherwise authorize any person, including Agent Members

and persons that may hold interests through Agent Members, to take any action which such Holder is entitled to take under this Indenture or the Notes held by it.

(g) In connection with the execution, authentication and delivery of Certificated Notes in exchange for beneficial interests in a Global Note pursuant to Section 306(b), the Note Registrar shall reflect on its books and records a decrease in the principal amount of the relevant Global Note equal to the principal amount of such Certificated Notes and the Company shall execute and the Trustee shall authenticate and deliver one or more Certificated Notes having an equal aggregate principal amount.

SECTION 307. *Transfer Provisions.*

(a) *General.* Unless and until (i) an Initial Note is sold under an effective Registration Statement, or (ii) an Initial Note is exchanged for an Exchange Note in connection with an effective Registration Statement, in each case pursuant to the Registration Rights Agreement, the provisions described below shall apply.

(b) *Certain Definitions.* As used in this Section 307 only, "delivery" of a certificate by a transferee or transferor means the delivery to the Note Registrar by such transferee or transferor of the applicable certificate duly completed; "holding" includes both possession of a physical Note and ownership of a beneficial interest in a Global Note, as the context requires; "transferring" a Global Note means transferring that portion of the principal amount of the transferor's beneficial interest therein that the transferor has

notified the Note Registrar that it has agreed to transfer; and "transferring" a Certificated Note means transferring that portion of the principal amount thereof that the transferor has notified the Note Registrar that it has agreed to transfer.

(c) *Procedures and Requirements.*

1. If the proposed transferor holds:

(A) a beneficial interest in the Rule 144A Global Note:

(i) and the proposed transferee is or is acting through an Agent Member and requests that the proposed transferee receive a beneficial interest in the Rule 144A Global Note, then the transfer shall be effected in accordance with the procedures of the Depositary therefor; and

(ii) and the proposed transferor delivers a Regulation S Certificate and the proposed transferee is or is acting through an Agent Member and requests that the proposed transferee receive a beneficial interest in the Regulation S Global Note, then the Note Registrar shall (x) record a decrease in the principal amount of the Rule 144A Global Note in an amount equal to the beneficial interest therein being transferred, (y) record an increase in the principal amount of the Regulation S Global Note equal to the amount of such decrease and (z) notify the Depositary in accordance with the procedures of the Depositary that it approves of such transfer, *provided,*

however, that until the 41st day after the later of the Commencement of the Offering and the Issue Date, beneficial interests in the Regulation S Global Note may be held only in or through accounts maintained at the Depositary at Euroclear and Cedel (or by Agent Members acting for the account thereof).

(B) a beneficial interest in the Regulation S Global Note:

(i) and the proposed transferor delivers a Rule 144A Certificate and the proposed transferee is or is acting through an Agent Member and requests that the proposed transferee receive a beneficial interest in the Rule 144A Global Note, then the Note Registrar shall (x) record a decrease in the principal amount of the Regulation S Global Note in an amount equal to the beneficial interest therein being transferred, (y) record an increase in the principal amount of the Rule 144A Global Note equal to the amount of such decrease and (z) notify the Depositary in accordance with the procedures of the Depositary that it approves of such transfer; and

(ii) and the proposed transferor requests that the proposed transferee receive a beneficial interest in the Regulation S Global Note, then the transfer will be effected through the procedures of the Depositary therefor *provided, however,* that until the 41st day after the later of the Commencement of the Offering and the Issue Date, beneficial interests in the Regulation S Global Note may be

held only in or through accounts maintained at the Depositary at Euroclear and Cedel (or by Agent Members acting for the account thereof).

(d) *Execution, Authentication and Delivery of Certificated Notes*. In any case in which the Note Registrar is required to deliver a Certificated Note to a transferee, the Company shall execute, and the Trustee shall authenticate and deliver, such Certificated Note.

(e) *Certain Additional Terms Applicable to Certificated Notes*.

(i) Any transferee entitled to receive a Certificated Note may request that the principal amount thereof be evidenced by one or more Certificated Notes in any authorized denomination or denominations and the Note Registrar shall comply with such request if all other transfer restrictions are satisfied.

(ii) In the event that a transferor transfers less than the entire principal amount of a Certificated Note surrendered for transfer, following the transfer the Note Registrar shall deliver to the transferor a new Certificated Note of the same type in principal amount equal to the untransferred portion of the surrendered Certificated Note.

(f) *Transfers Not Covered by Section 307(c)*. The Note Registrar shall record, upon receipt of a Company Request from the Company so to do and stating therein that the

Company has received from the proposed transferor or transferee a Non-Registration Opinion and Supporting Evidence, a transfer not otherwise permitted by Section 307(c).

(g) *Private Placement Legend*. Upon the transfer, exchange or replacement of Notes not bearing the Private Placement Legend, the Note Registrar shall deliver Notes that do not bear the Private Placement Legend. Upon the transfer, exchange or replacement of Notes bearing the Private Placement Legend, the Note Registrar shall deliver only Notes that bear the Private Placement Legend unless either (i) the Private Placement Legend is no longer required pursuant to Section 202, or (ii) the Trustee is otherwise directed pursuant to a Company Request.

(h) *General*. By its acceptance of any Note bearing the Private Placement Legend, each Holder of such Note acknowledges the restrictions on transfer of such Note set forth in this Indenture and in the Private Placement Legend and agrees that it will transfer such Note only as provided in this Indenture. The Note Registrar shall not register a transfer of any Note unless such transfer complies with the restrictions with respect thereto set forth in this Indenture. The Note Registrar shall not be required to determine (but may rely upon a determination made by the Company) the sufficiency of any such certifications, legal opinions or other information.

SECTION 308. *Mutilated, Destroyed, Lost and Stolen Notes*.

If (i) any mutilated Note is surrendered to the Trustee, or (ii) the Company and the Trustee receive evidence to their

satisfaction of the destruction, loss or theft of any Note, and there is delivered to the Company and the Trustee such security or indemnity as may be required by them to save each of them harmless, then, in the absence of notice to the Company or the Trustee that such Note has been acquired by a bona fide purchaser, ,the Company shall execute and upon Company Order the Trustee shall authenticate and deliver, in exchange for any such mutilated Note or in lieu of any such destroyed, lost or stolen Note, a new Note of like tenor and principal amount, bearing a number not contemporaneously outstanding.

In case any such mutilated, destroyed, lost or stolen Note has become or is about to become due and payable, the Company in its discretion may, instead of issuing a new Note, pay such Note.

Upon the issuance of any new Note under this Section, the Company may require the payment of a sum sufficient to cover any tax or other governmental charge that may be imposed in relation thereto and any other expenses (including the fees and expenses of the Trustee) connected therewith.

Every new Note issued pursuant to this Section in lieu of any mutilated, destroyed, lost or stolen Note shall constitute an original contractual obligation of the Company, whether or not the mutilated, destroyed, lost or stolen Note shall be at any time enforceable by anyone, and shall be entitled to all benefits of this Indenture equally and proportionately with any and all other Notes duly issued hereunder.

The provisions of this Section are exclusive and shall preclude (to the extent lawful) all other rights and remedies with respect to the replacement or payment of mutilated, destroyed, lost or stolen Notes.

SECTION 309. *Payment of Interest; Interest Rights Preserved.*

Interest on any Note (and Additional Interest, if any, and any Additional Amounts payable in respect thereof, if any) which is payable, and is punctually paid or duly provided for, on any Interest Payment Date shall be paid to the Person in whose name such Note (or one or more Predecessor Notes) is registered at the close of business on the Regular Record Date for such interest at the office or agency of the Company maintained for such purpose pursuant to Section 1002; *provided, however,* that each installment of interest may at the Company's option be paid by (i) mailing a check for such interest, payable to or upon the written order of the Person entitled thereto pursuant to Section 310, to the address of such Person as it appears in the Note Register on such Regular Record Date or (ii) transfer to an account located in the United States maintained by the payee and as notified to the Trustee prior to such Regular Record Date.

Any interest on any Note (and Additional Interest, if any, and any Additional Amounts payable in respect thereof, if any) which is payable, but is not punctually paid or duly provided for, on any Interest Payment Date shall forthwith cease to be payable to the Holder on the Regular Record Date by virtue of having been such Holder, and such defaulted interest (and Additional Interest, if any, and any Additional

Amounts payable in respect thereof, if any) and (to the extent lawful) interest on such defaulted interest at the rate borne by the Notes (such defaulted interest and interest thereon herein collectively called "Defaulted Interest") may be paid by the Company, at its election in each case, as provided in clause (1) or (2) below:

(1) The Company may elect to make payment of any Defaulted Interest to the Persons in whose names the Notes (or their respective Predecessor Notes) are registered at the close of business on a Special Record Date for the payment of such Defaulted Interest, which shall be fixed in the following manner. The Company shall notify the Trustee in writing of the amount of Defaulted Interest proposed to be paid on each Note and the date of the proposed payment, and at the same time the Company shall deposit with the Trustee an amount of money equal to the aggregate amount proposed to be paid in respect of such Defaulted Interest or shall make arrangements satisfactory to the Trustee for such deposit at least one Business Day prior to the date of the proposed payment, such money when deposited to be held in trust for the benefit of the Persons entitled to such Defaulted Interest as provided in this clause. Thereupon the Trustee shall fix a Special Record Date for the payment of such Defaulted Interest which shall be not more than 15 days and not less than 10 days prior to the date of the proposed payment and not less than 10 days after the receipt by the Trustee of the notice of the proposed

payment. The Trustee shall promptly notify the Company of such Special Record Date, and in the name and at the expense of the Company, shall cause notice of the proposed payment of such Defaulted Interest and the Special Record Date therefor to be given in the manner provided for in Section 106, not less than 10 days prior to such Special Record Date. Notice of the proposed payment of such Defaulted Interest and the Special Record Date therefor having been so given, such Defaulted Interest shall be paid to the Persons in whose names the Notes (or their respective Predecessor Notes) are registered at the close of business on such Special Record Date and shall no longer be payable pursuant to the following clause (2).

(2) The Company may make payment of any Defaulted Interest in any other lawful manner not inconsistent with the requirements of any securities exchange on which the Notes may be listed, and upon such notice as may be required by such exchange, if, after notice given by the Company to the Trustee of the proposed payment pursuant to this clause, such manner of payment shall be deemed practicable by the Trustee.

Subject to the foregoing provisions of this Section, each Note delivered under this Indenture upon registration of transfer of or in exchange for or in lieu of any other Note shall carry the rights to interest accrued and unpaid, and to accrue, which were carried by such other Note.

SECTION 310. *Persons Deemed Owners.*

Prior to the due presentment of a Note for registration of transfer, the Company, the Trustee and any agent of the Company or the Trustee may treat the Person in whose name such Note is registered in the Note Register as the owner of such Note for the purpose of receiving payment of principal of (and premium, if any) and (subject to Sections 305 and 309) interest on such Note and for all other purposes whatsoever, whether or not such Note be overdue, and none of the Company, the Trustee or any agent of the Company or the Trustee shall be affected by notice to the contrary.

SECTION 311. *Cancellation.*

All Notes surrendered for payment, redemption or registration of transfer or exchange shall, if surrendered to any Person other than the Trustee, be delivered to the Trustee and shall be promptly cancelled by it. The Company may at any time deliver to the Trustee for cancellation any Notes previously authenticated and delivered hereunder which the Company may have acquired in any manner whatsoever, and may deliver to the Trustee (or to any other Person for delivery to the Trustee) for cancellation any Notes previously authenticated hereunder which the Company has not issued and sold, and all Notes so delivered shall be promptly cancelled by the Trustee. If the Company shall so acquire any of the Notes, however, such acquisition shall not operate as a redemption or satisfaction of the indebtedness represented by such Notes unless and until the same are surrendered to the Trustee for cancellation. No Notes shall be authenticated in lieu of or in exchange for any Notes

cancelled as provided in this Section, except as expressly permitted by this Indenture. All cancelled Notes held by the Trustee shall be disposed of by the Trustee in accordance with its customary procedures and certification of their disposal delivered to the Company unless by Company Order the Company shall direct that cancelled Notes be returned to it.

SECTION 312. *Computation of Interest.*

Interest on the Notes shall be computed on the basis of a 360-day year of twelve 30-day months.

SECTION 313. *CUSIP and CINS Numbers.*

The Company in issuing the Notes may use "CUSIP" and "CINS" numbers (if then generally in use), and, if so, the Trustee shall use "CUSIP" or "CINS" numbers in notices of redemption or exchange as a convenience to Holders; *provided* that any such notice shall state that no representation is made as to the correctness of such numbers either as printed on the Notes or as contained in any notice of a redemption or exchange and that reliance may be placed only on the other identification numbers printed on the Notes, and any such redemption shall not be affected by any defect in or omission of such numbers.

ARTICLE FOUR

SATISFACTION AND DISCHARGE

SECTION 401. *Satisfaction and Discharge of Indenture.*

This Indenture shall upon Company Request cease to be of further effect (except as to surviving rights of registration

of transfer or exchange of the Notes as expressly provided for herein or pursuant hereto and obligations to pay Additional Amounts, if any) and the Trustee, at the expense of the Company, shall execute proper instruments acknowledging satisfaction and discharge of this Indenture when

(1) either

(a) all Notes theretofore authenticated and delivered (other than (i) Notes which have been destroyed, lost or stolen and which have been replaced or paid as provided in Section 308 and (ii) Notes for whose payment money has theretofore been deposited in trust with the Trustee or any Paying Agent or segregated and held in trust by the Company and thereafter repaid to the Company or discharged from such trust, as provided in Section 1003) have been delivered to the Trustee for cancellation; or

(b) all such Notes not theretofore delivered to the Trustee for cancellation

(i) have become due and payable, or

(ii) will become due and payable at their Stated Maturity within one year, or,

(iii) are to be called for redemption within one year under arrangements satisfactory to the Trustee for the giving of notice of redemption by the Trustee in the name, and at the expense, of the Company,

and the Company, in the case of (i), (ii) or (iii) above, has irrevocably deposited or caused to be deposited with the Trustee as trust funds in trust for such purpose an amount sufficient to pay and discharge the entire Indebtedness on such Notes not theretofore delivered to the Trustee for cancellation, for principal of, premium, if any, Additional Amounts, if any, and interest on the Notes to the date of such deposit (in the case of Notes which have become due and payable) or to the Stated Maturity or Redemption Date, as the case may be;

(2) the Company has paid or caused to be paid all other sums payable hereunder by the Company; and

(3) the Company has delivered to the Trustee an Officer's Certificate and an Opinion of Counsel, each stating that all conditions precedent herein provided for relating to the satisfaction and discharge of this Indenture have been complied with.

Notwithstanding the satisfaction and discharge of this Indenture, the obligations of the Company to the Trustee under Section 606, Section 1007 and, if money shall have been deposited with the Trustee pursuant to subclause (b) of clause (1) of this Section, the obligations of the Trustee under Section 402 and the last paragraph of Section 1003 shall survive.

SECTION 402. *Application of Trust Money*.

Subject to the provisions of the last paragraph of Section 1003, all money deposited with the Trustee pursuant

to Section 401 shall be held in trust and applied by it, in accordance with the provisions of the Notes and this Indenture, to the payment, either directly or through any Paying Agent (including the Company acting as its own Paying Agent) as the Trustee may determine, to the Persons entitled thereto, of the principal of, premium, if any, Additional Amounts, if any, and interest, including Additional Interest, if any, on the Notes for whose payment such money has been deposited with the Trustee; but such money need not be segregated from other funds except to the extent required by law.

ARTICLE FIVE

REMEDIES

SECTION 501. *Events of Default.*

"Event of Default", wherever used herein, means any one of the following events (whatever the reason for such Event of Default and whether it shall be voluntary or involuntary or be effected by operation of law or pursuant to any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body):

(1) default in the payment of any interest, including Additional Interest, if any, and Additional Amounts, if any, in respect of interest on any Note when it becomes due and payable and continuance of such default for a period of five Business Days; or

(2) default in the payment of the principal of or premium, if any, on any Note when it becomes due and

payable at its Stated Maturity, or the failure to redeem Notes in the required principal amounts on any Mandatory Redemption Date; or

(3) default in the performance, or breach, of the provisions of Article Eight of this Indenture or the failure to make or consummate a Change of Control Offer in accordance with the provisions of Section 1015; or

(4) the failure to deliver to the Trustee the LOC on or before January 6, 1999 as provided in the LOC and Deposit Agreement (unless the Deposit shall have been made on or before January 6, 1999), or the failure to make the Deposit into the Construction Funding Account on or before May 6, 1999 as provided in the LOC and Deposit Agreement (unless as a result of such failure the Trustee shall have the right to draw such amount under the LOC, in which case no Event of Default shall occur unless and until the drawing thereunder shall have been dishonored by the issuer of such LOC), each on the respective terms and conditions set out in the LOC and Deposit Agreement as in effect on the date hereof and the LOC; or

(5) default in the performance, or breach, of any covenant or agreement of the Company, the Holding Company, any of the Hong Kong Holding Companies or any of the Toll Road Joint Ventures contained in this Indenture or the Security Documents or any undertaking in an Officer's Certificate (other than a default in the performance, or breach, of a covenant or agreement which is specifically dealt with elsewhere in this Indenture), and continuance of such default or breach for a period of 30 days after there has been given,

by registered or certified mail, to the Company by the Trustee or to the Company and the Trustee by the Holders of at least 25% in the aggregate principal amount of the Outstanding Notes, *provided, however,* that any failure on the part of the Company to (A) cause the Hong Kong Holding Companies to dispose of their interests in the Non-Project Toll Road Joint Ventures within eighteen months after the Issue Date in accordance with Section 1023, or (B) install computerized ticketing systems in accordance with Section 1024 shall not constitute an Event of Default hereunder; or

(6) any default by the Company or any Subsidiary of the Company in the payment of the principal of or premium, if any, on Indebtedness aggregating US$2 million or more, when the same become due and payable at the final maturity thereof, or Indebtedness of the Company or any Subsidiary of the Company aggregating US$2 million or more shall have been accelerated or otherwise declared due and payable, or required to be prepaid or repurchased (other than by regularly scheduled required prepayment), prior to the Stated Maturity thereof; or

(7) (A) on or after the Issue Date, other than in accordance with the provisions of this Indenture, for any reason, other than the satisfaction in full and discharge of the obligations secured thereby, any Security Document ceases to be or is not in full force and effect or the Trustee shall cease to have first priority security interests in the Collateral or (B) on or after the Issue Date other than in accordance with the provisions of this Indenture, the Company asserts in writing that any Security Document has ceased to be or is not in full force and effect; or

(8) the entry of a decree or order by a court having jurisdiction in the premises adjudging the Company or any Subsidiary of the Company a bankrupt or insolvent, or approving as properly filed a petition seeking reorganization, arrangement, adjustment or composition of or in respect of the Company or any Subsidiary of the Company under any Bankruptcy Law or any other applicable federal or state law, or appointing a receiver, liquidator, assignee, trustee, sequestrator (or other similar official) of the Company or any Subsidiary of the Company or of any substantial part of its property, or ordering the winding up or liquidation of its affairs, and the continuance of any such decree or order unstayed and in effect for a period of 60 consecutive days; or

(9) the institution by the Company or any Subsidiary of the Company of proceedings to be adjudicated a bankrupt or insolvent, or the consent by it to the institution of bankruptcy or insolvency proceedings against it, or the filing by it of a petition or answer or consent seeking reorganization or relief under any Bankruptcy Law or any other applicable federal or state law, or the consent by it to the filing of any such petition or to the appointment of a receiver, liquidator, assignee, trustee, sequestrator (or other similar official) of the Company or any Subsidiary of the Company or of any substantial part of its property, or the making by it of an assignment for the benefit of creditors, or the admission by it in writing of its inability to pay its debts generally as they become due; or

(10) the entry against the Company or any Subsidiary of the Company of any judgment or decree for the payment of money in excess of US$2 million (or an equivalent amount

in another currency) that is not discharged and either (A) commencement of an enforcement proceeding by any creditor upon such judgment or decree or (B) the passage of a period of 60 days following such judgment or decree during which such judgment or decree, is not waived or the execution thereof stayed; or

(11) (A) all or a substantial part of the property of the Company or any Subsidiary of the Company shall be condemned, seized or otherwise appropriated, or custody of such property shall be assumed by any governmental authority or court or other person purporting to act under the authority of the Government of any jurisdiction, or (B) the Company or any of its Subsidiaries shall be prevented from exercising normal control over all or a substantial part of its property, if in either case the whole or part of such property shall be material to the Company and its Subsidiaries considered as a whole, or (C) any of the Joint Venture Contracts becomes wholly or partially illegal, invalid or unenforceable and the Company fails to obtain a Rating Confirmation within 45 days after any such event occurs.

SECTION 502. *Acceleration of Maturity; Rescission and Annulment.*

If an Event of Default (other than an Event of Default specified in clause (8) or clause (9) of Section 501) occurs and is continuing, then and in every such case the Trustee or the Holders of not less than 25% in aggregate principal amount of the Notes Outstanding may, and the Trustee upon written request of such Holders shall, declare the principal of, premium, if any, and accrued interest on all of the

Outstanding Notes immediately due and payable, and upon any such declaration all such amounts payable in respect of the Notes shall become immediately due and payable. If an Event of Default specified in clause (8) or clause (9) of Section 501 occurs and is continuing, then the principal of, premium, if any, and accrued interest on all of the Outstanding Notes shall ipso facto become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holder of Notes.

At any time after a declaration of acceleration has been made and before a judgment or decree for payment of the money due has been obtained by the Trustee as hereinafter provided in this Article, the Holders of a majority in principal amount of the Notes Outstanding, by written notice to the Company and the Trustee, may rescind and annul such declaration and its consequences if

(1) the Company has paid or deposited with the Trustee a sum sufficient to pay,

(A) all overdue interest on all outstanding Notes,

(B) all unpaid principal of (and premium, if any, on) any Outstanding Notes which has become due otherwise than by such declaration of acceleration, and interest on such unpaid principal at the rate borne by the Notes,

(C) to the extent that payment of such interest is lawful, interest on overdue interest at the rate borne by the Notes, and

(D) all sums paid or advanced by the Trustee hereunder and the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel; and

(2) all Events of Default, other than the non-payment of amounts of principal of, premium, if any, or interest on Notes which have become due solely by such declaration of acceleration, have been cured or waived as provided in Section 513.

No such rescission shall affect any subsequent default or impair any right consequent thereon.

The Holders of not less than a majority in aggregate principal amount of the Outstanding Notes may, on behalf of the Holders of all the Notes, waive any past Defaults under this Indenture, except a Default in the payment of the principal of, premium, if any, or interest on any Note, or in respect of a covenant or provision which under this Indenture cannot be modified or amended without the consent of the Holder of each Note Outstanding.

SECTION 503. *Collection of Indebtedness and Suits for Enforcement by Trustee.*

The Company covenants that if

(a) default is made in the payment of any installment of interest including Additional Interest, if any, any Additional Amounts, if any, on any Note when such interest or Additional

Amounts becomes due and payable and such default continues for a period of five Business Days, or

(b) default is made in the payment of the principal of or premium, if any, on any Note at the Stated Maturity thereof, or on any Mandatory Redemption Date,

the Company will, upon demand of the Trustee, pay to the Trustee for the benefit of the Holders of such Notes, the whole amount then due and payable on such Notes for principal, premium, if any, interest on Additional Amounts, if any, and interest on any overdue principal, premium, if any, or Additional Amounts, if any, and, to the extent that payment of such interest shall be legally enforceable, upon any overdue installment of interest, including Additional Interest, if any and overdue principal, at the rate borne by the Notes, and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel.

If the Company fails to pay such amounts forthwith upon such demand, the Trustee, in its own name as trustee of an express trust, may institute a judicial proceeding for the collection of the sums so due and unpaid, may prosecute such proceeding to judgment or final decree and may enforce the same against the Company or any other obligor upon the Notes and collect the moneys adjudged or decreed to be payable in the manner provided by law out of the property of the Company or any other obligor upon the Notes, wherever situated.

If an Event of Default occurs and is continuing, the Trustee may in its discretion, proceed to protect and enforce its rights and the rights of the Holders by such appropriate judicial proceedings as the Trustee shall deem most effectual to protect and enforce any such rights, whether for the specific enforcement of any covenant or agreement in this Indenture or the Security Documents or in aid of the exercise of any power granted herein or therein, or to enforce any other proper remedy.

SECTION 504. *Trustee May File Proofs of Claim.*

In case of the pendency of any receivership, insolvency, liquidation, bankruptcy, reorganization, arrangement, adjustment, composition or other judicial proceeding relative to the Company or any other obligor upon the Notes or the property of the Company or of such other obligor or their creditors, the Trustee (irrespective of whether the principal of the Notes shall then be due and payable as therein expressed or by declaration or otherwise and irrespective of whether the Trustee shall have made any demand on the Company for the payment of overdue principal, premium, if any, interest, or Additional Amounts, if any) shall be entitled and empowered, by intervention in such proceeding or otherwise,

(i) to file and prove a claim for the whole amount of principal (and premium, if any), interest and Additional Amounts, if any, owing and unpaid in respect of the Notes and to file such other papers or documents as may be necessary or advisable in order to have the claims of the Trustee (including any claim for the reasonable compensation,

expenses, disbursements and advances of the Trustee, its agents and counsel) and of the Holders allowed in such judicial proceeding, and

(ii) to collect and receive any moneys or other property payable or deliverable on any such claims and to distribute the same;

and any custodian, receiver, assignee, trustee, liquidator, sequestrator or similar official in any such judicial proceeding is hereby authorized by each Holder to make such payments to the Trustee and, in the event that the Trustee shall consent to the making of such payments directly to the Holders, to pay the Trustee any amount due to it for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel, and any other amounts due the Trustee under Section 606.

Nothing herein contained shall be deemed to authorize the Trustee to authorize or consent to or accept or adopt on behalf of any Holder any plan of reorganization, arrangement, adjustment or composition affecting the Notes or the rights of any Holder thereof, or to authorize the Trustee to vote in respect of the claim of any Holder in any such proceeding.

SECTION 505. *Trustee May Enforce Claims Without Possession of Notes.*

All rights of action and claims under this Indenture or the Notes may be prosecuted and enforced by the Trustee without the possession of any of the Notes or the production thereof in any proceeding relating thereto, and any such

proceeding instituted by the Trustee shall be brought in its own name and as trustee of an express trust, and any recovery of judgment shall, after provision for the payment of the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel, be for the ratable benefit of the Holders of the Notes in respect of which such judgment has been recovered.

SECTION 506. *Application of Money Collected.*

Any money collected by the Trustee pursuant to this Article shall be applied in the following order, at the date or dates fixed by the Trustee and, in case of the distribution of such money on account of principal (or premium, if any), interest, or Additional Amounts, if any, upon presentation of the Notes and the notation thereon of the payment if only partially paid and upon surrender thereof if fully paid:

FIRST: To the payment of all amounts due to the Trustee under Section 606;

SECOND: To the payment of the amounts then due and unpaid for principal of (and premium, if any), interest, including Additional Interest, if any, and Additional Amounts, if any, on the Notes in respect of which or for the benefit of which such money has been collected, ratably, without preference or priority of any kind, according to the amounts due and payable on such Notes for principal (and premium, if any), interest, including Additional Invest, if any, and Additional Amounts, if any, respectively; and

THIRD: The balance, if any, to the Company or as otherwise required by law.

SECTION 507. *Limitation on Suits.*

No Holder of any Notes shall have any right to institute any proceeding, judicial or otherwise, with respect to this Indenture, or for the appointment of a receiver or trustee, or for any other remedy hereunder, unless

(1) such Holder has previously given written notice to the Trustee of a continuing Event of Default;

(2) the Holders of not less than 25% in principal amount of the Outstanding Notes shall have made written request to the Trustee to institute proceedings in respect of such Event of Default in its own name as Trustee hereunder;

(3) such Holder or Holders have offered to the Trustee reasonable indemnity against the costs, expenses and liabilities (including fees and expenses of its agents and counsel) to be incurred in compliance with such request;

(4) the Trustee for 60 days after its receipt of such notice, request and offer of indemnity has failed to institute any such proceeding; and

(5) no direction inconsistent with such written request has been given to the Trustee

during such 60-day period by the Holders of not less than a majority in the aggregate principal amount of the Outstanding Notes;

it being understood and intended that no one or more Holders shall have any right in any manner whatever by virtue of, or by availing of, any provision of this Indenture to affect, disturb or prejudice the rights of any other Holders, or to obtain or to seek to obtain priority or preference over any other Holders or to enforce any right under this Indenture, except in the manner herein provided and for the equal and ratable benefit of all the Holders.

SECTION 508. *Unconditional Right of Holders to Receive Principal, Premium, Interest and Additional Amounts.*

Notwithstanding any other provision in this Indenture, the Holder of any Note shall have the right, which is absolute and unconditional, to receive payment, as provided herein (including, if applicable, Article Twelve) and in such Note of the principal of (and premium, if any) and (subject to Section 309) interest on and Additional Amounts, if any, in respect of such Note on the respective Stated Maturities expressed in such Note (or, in the case of redemption, on the Redemption Date) and to institute suit for the enforcement of any such payment, and such rights shall not be impaired without the consent of such Holder.

SECTION 509. *Restoration of Rights and Remedies.*

If the Trustee or any Holder has instituted any proceeding to enforce any right or remedy under this Indenture and such

proceeding has been discontinued or abandoned for any reason, or has been determined adversely to the Trustee or to such Holder, then and in every such case, subject to any determination in such proceeding, the Company, the Trustee and the Holders shall be restored severally and respectively to their former positions hereunder and thereafter all rights and remedies of the Trustee and the Holders shall continue as though no such proceeding had been instituted.

SECTION 510. *Rights and Remedies Cumulative.*

Except as otherwise provided with respect to the replacement or payment of mutilated, destroyed, lost or stolen Notes in the last paragraph of Section 308, no right or remedy herein conferred upon or reserved to the Trustee or to the Holders is intended to be exclusive of any other right or remedy, and every right and remedy shall, to the extent permitted by law, be cumulative and in addition to every other right and remedy given hereunder or now or hereafter existing at law or in equity or otherwise. The assertion or employment of any right or remedy hereunder, or otherwise, shall not prevent the concurrent assertion or employment of any other appropriate right or remedy.

SECTION 511. *Delay or Omission Not Waiver.*

No delay or omission of the Trustee or of any Holder of any Note to exercise any right or remedy accruing upon any Event of Default shall impair any such right or remedy or constitute a waiver of any such Event of Default or an acquiescence therein. Every right and remedy given by this Article or by law to the Trustee or to the Holders may be

exercised from time to time, and as often as may be deemed expedient, by the Trustee or by the Holders, as the case may be.

SECTION 512. *Control by Holders.*

Subject to the provisions of Section 602(5), the Holders of not less than a majority in the aggregate principal amount of the Outstanding Notes shall have the right to direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or exercising any trust or power conferred on the Trustee, *provided* that

(1) such direction shall not be in conflict with any rule of law or with this Indenture or the Security Documents,

(2) the Trustee may take any other action deemed proper by it which is not inconsistent with such direction, and

(3) the Trustee need not take any action which might subject it to personal liability or be unjustly prejudicial to the Holders not consenting.

SECTION 513. *Waiver of Past Defaults.*

The Holders of not less than a majority in aggregate principal amount of the Outstanding Notes may on behalf of the Holders of all the Notes waive any past default hereunder and under the Notes and its consequences, except a Default

(1) in respect of the payment of the principal of, premium, if any, interest or Additional Amounts, if any, in respect of any Note, or

(2) in respect of a covenant or provision hereof which under Article Nine cannot be modified or amended without the consent of the Holder of each Outstanding Note affected.

Upon any such waiver, such default shall cease to exist, and any Event of Default arising therefrom shall be deemed to have been cured, for every purpose of this Indenture and the Notes; but no such waiver shall extend to any subsequent or other default or Event of Default or impair any right consequent thereon.

SECTION 514. *Waiver of Stay or Extension Laws.*

The Company covenants (to the extent that it may lawfully do so) that it will not at any time insist upon, or plead, or in any manner whatsoever claim or take the benefit or advantage of, any stay or extension law wherever enacted, now or at any time hereafter in force, which may affect the covenants or the performance of this Indenture; and the Company (to the extent that it may lawfully do so) hereby expressly waives all benefit or advantage of any such law and covenants that it will not hinder, delay or impede the execution of any power herein granted to the Trustee, but will suffer and permit the execution of every such power as though no such law had been enacted.

Appendix C

SECTION 515. *Judgment Currency.*

The obligations of the Company to any Holder of Notes under this Indenture or the Notes shall, to the extent permitted by applicable law, notwithstanding any judgment in a currency (the "Judgment Currency") other than U.S. Dollars (the "Agreement Currency"), be discharged only to the extent that on the day following receipt by such Holder of Notes or the Trustee, as the case may be, of any amount in the Judgment Currency, such Holder of Notes or the Trustee, as the case may be, may in accordance with normal banking procedures purchase the Agreement Currency with the Judgment Currency. If the amount of the Agreement Currency so purchased is less than the amount originally to be paid to such Holder of Notes or the Trustee, as the case may be, in the Agreement Currency, the Company agrees, as a separate obligation and notwithstanding such judgment, to pay the difference and if the amount of the Agreement Currency so purchased exceeds the amount originally to be paid to such Holder of Notes or the Trustee, as the case may be, such Holder of Notes or the Trustee, as the case may be, agrees to pay to or for the account of the Company such excess, *provided* that such Holder of Notes or the Trustee, as the case may be, shall not have any obligation to pay any such excess as long as a Default by the Company in its obligations under the Notes or this Indenture has occurred and is continuing, in which case such excess shall be applied by such Holder of Notes or the Trustee, as the case may be, to such obligations.

Appendix C

ARTICLE SIX

THE TRUSTEE

SECTION 601. *Notice of Defaults.*

Within 30 days after the occurrence of any Default hereunder, the Trustee shall transmit in the manner and to the extent provided in TIA Section 313(c), notice of such Default hereunder known to the Trustee, unless such Default shall have been cured or waived; *provided, however,* that, except in the case of a Default in the payment of the principal of (or premium, if any) or interest on or Additional Amounts, if any, in respect of any Note or in the making of a mandatory redemption, the Trustee shall be protected in withholding such notice if and so long as the board of directors, the executive committee or a trust committee of directors and/or Responsible Officers of the Trustee in good faith determines that the withholding of such notice is in the interest of the Holders; and *provided further* that in the case of any Default of the character specified in Section 501(5) no such notice to Holders shall be given until at least 30 days after the occurrence thereof.

SECTION 602. *Certain Rights of Trustee.*

Subject to the provisions of TIA Section 315(a) through 315(d):

(1) the Trustee may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request,

direction, consent, order, bond, debenture, note, other evidence of indebtedness or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties;

(2) any request or direction of the Company mentioned herein shall be sufficiently evidenced by a Company Request or Company Order and any resolution of the Board of Directors may be sufficiently evidenced by a Board Resolution;

(3) whenever in the administration of this Indenture or any Security Document the Trustee shall deem it desirable that a matter be proved or established prior to taking, suffering or omitting any action hereunder, the Trustee (unless other evidence be herein specifically prescribed) may require and, in the absence of bad faith on its part, rely upon an Officer's Certificate;

(4) the Trustee may consult with counsel and the written advice of such counsel or any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken, suffered or omitted by it hereunder or any Security Document in good faith and in reliance thereon;

(5) the Trustee shall be under no obligation to exercise any of the rights or powers vested in it by this Indenture or any Security Document at the request or direction of any of the Holders pursuant to this Indenture, unless such Holders shall have offered to the Trustee reasonable security or indemnity against the costs, expenses and liabilities which might be incurred by it in compliance with such request or direction;

(6) the Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, bond, debenture, note, other evidence of indebtedness or other paper or document and may conclusively rely as to the truth of the statements and correctness of the opinions stated therein, but the Trustee, in its discretion, may make such further inquiry or investigation into such facts or matters as it may see fit, and, if the Trustee shall determine to make such further inquiry or investigation, it shall be entitled to examine the books, records and premises of the Company, personally or by agent or attorney, upon reasonable notice and during regular business hours;

(7) the Trustee may execute any of the trusts or powers hereunder or any Security Document or perform any duties hereunder either directly or by or through agents or attorneys and the Trustee shall not be responsible for any misconduct or negligence on the part of any agent or attorney appointed with due care by it hereunder; and

(8) the Trustee shall not be liable for any action taken, suffered or omitted by it in good faith and believed by it to be authorized or within the discretion or rights or powers conferred upon it by this Indenture or any Security Document.

(9) in no event whatsoever shall the Trustee be liable for special, indirect or consequential loss or damage of any kind whatever (including but not limited to lost profits), even if the Trustee has been advised of the likelihood of such loss or damages and regardless of the form of action.

The Trustee shall not be required to expend or risk its own funds or otherwise incur any financial liability in the performance of any of its duties hereunder or any Security Document, or in the exercise of any of its rights or powers hereunder or any Security Document if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not reasonably assured to it.

Except as otherwise specifically provided in this Indenture, (i) all references in this Indenture to the Trustee shall be deemed to refer to the Trustee in its capacity as Trustee and in its capacities as Note Registrar, Collateral Agent and Paying Agent and (ii) every provision of this Indenture relating to the conduct or affecting the liability or offering protection, immunity or indemnity to the Trustee shall be deemed to apply with the same force and effect to the Trustee acting in its capacities as Paying Agent, Collateral Agent and Note Registrar and to each other Paying Agent.

The Trustee shall not, under any circumstances, have any liability with respect to the validity or perfection of any security interest purported to be created by this Indenture or any Security Document.

SECTION 603. *Trustee Not Responsible for Recitals or Issuance of Notes.*

The recitals contained herein and in the Notes, except for the Trustee's certificate of authentication, shall be taken as the statements of the Company, and the Trustee assumes no responsibility for their correctness. The Trustee makes

no representations as to the validity or sufficiency of this Indenture or of the Notes, except that the Trustee represents that it is duly authorized to execute and deliver this Indenture, authenticate the Notes and perform its obligations hereunder and that the statements made by it in any Statement of Eligibility on Form T-1 supplied to the Company will be true and accurate, subject to the qualifications set forth therein. The Trustee shall not be accountable for the use or application by the Company of Notes or the proceeds thereof.

SECTION 604. *May Hold Notes.*

The Trustee, any Paying Agent, any Note Registrar or any other agent of the Company or of the Trustee, in its individual or any other capacity, may become the owner or pledgee of Notes and, subject to TIA Sections 310(b) and 311, may otherwise deal with the Company with the same rights it would have if it were not Trustee, Collateral Agent, Paying Agent, Note Registrar or such other agent.

SECTION 605. *Money Held in Trust.*

Money held by the Trustee in trust hereunder need not be segregated from other funds except to the extent required by law. The Trustee shall be under no liability for interest on any money received by it hereunder except as otherwise agreed in writing with the Company.

SECTION 606. *Compensation and Reimbursement.*

The Company agrees:

(1) to pay to the Trustee and each other Paying Agent from time to time compensation as

the Company and the Trustee or each other Paying Agent, as the case may be, shall agree in writing for all services rendered by it hereunder and under the Security Documents (which compensation shall not be limited by any provision of law in regard to the compensation of a trustee of an express trust);

(2) except as otherwise expressly provided herein, to reimburse the Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by the Trustee and each other Paying Agent in accordance with any provision of this Indenture or under the Security Documents (including the reasonable compensation and the expenses and disbursements of its agents and counsel), except any such expense, disbursement or advance as may be attributable to its gross negligence or wilful misconduct; and

(3) to indemnify the Trustee, any person in whose name any Security Assets (as defined in the Mortgage of Shares) are registered and each other Paying Agent for, and to hold it harmless against, any loss, liability or expense (including the reasonable compensation and expenses of its counsel and other Persons not regularly in its employ) incurred without gross negligence or wilful misconduct on its part, arising out of or in connection with the acceptance or administration of this trust under this Indenture or in respect of the performance of its duties as the Collateral

Agent under the Security Documents, including the costs and expenses of investigating or defending itself against any claim or liability in connection with the exercise or performance of any of its powers or duties hereunder or thereunder.

The obligations of the Company under this Section to compensate the Trustee, to pay or reimburse the Trustee for expenses, disbursements and advances and to indemnify and hold harmless the Trustee shall constitute additional indebtedness hereunder and shall survive the satisfaction and discharge of this Indenture. As security for the performance of such obligations of the Company, the Trustee shall have a lien prior to the Notes upon all property and funds held or collected by the Trustee as such, except funds held in trust for the payment of principal of (and premium, if any), interest on or Additional Amounts, if any, in respect of particular Notes.

The provisions of this Section shall survive the resignation or removal of the Trustee and the termination of this Indenture.

SECTION 607. *Corporate Trustee Required; Eligibility*

There shall be at all times a Trustee hereunder which shall be eligible to act as Trustee under TIA Section 310(a)(1) and which shall have a combined capital and surplus of at least US$50,000,000. If such corporation publishes reports of condition at least annually, pursuant to law or to the requirements of federal, state, territorial or District of Columbia supervising or examining authority, then for the

purposes of this Section, the combined capital and surplus of such corporation shall be deemed to be its combined capital and surplus as set forth in its most recent report of condition so published. If at any time the Trustee shall cease to be eligible in accordance with the provisions of this Section, it shall resign immediately in the manner and with the effect hereinafter specified in this Article.

SECTION 608. *Resignation And Removal; Appointment of Successor.*

(a) No resignation or removal of the Trustee and no appointment of a successor Trustee pursuant to this Article shall become effective until the acceptance of appointment by the successor Trustee in accordance with the applicable requirements of Section 609.

(b) The Trustee may resign at any time by giving written notice thereof to the Company. If the instrument of acceptance by a successor Trustee required by Section 609 shall not have been delivered to the Trustee within 30 days after the giving of such notice of resignation, the resigning Trustee may petition any court of competent jurisdiction for the appointment of a successor Trustee.

(c) The Trustee may be removed at any time by Act of the Holders of not less than a majority in principal amount of the Outstanding Notes, delivered to the Trustee and to the Company.

(d) If at any time:

(1) the Trustee shall fail to comply with the provisions of TIA Section 310(b) after written request therefor by the Company or by any Holder who has been a bona fide Holder of a Note for at least six months, or

(2) the Trustee shall cease to be eligible under Section 607 and shall fail to resign after written request therefor by the Company or by any Holder who has been a bona fide Holder of a Note for at least six months, or

(3) the Trustee shall become incapable of acting or shall be adjudged a bankrupt or insolvent or a receiver of the Trustee or of its property shall be appointed or any public officer shall take charge or control of the Trustee or of its property or affairs for the purpose of rehabilitation, conservation or liquidation,

then, in any such case, (i) the Company, by a Board Resolution, may remove the Trustee, or (ii) subject to TIA Section 315(e), any Holder who has been a bona fide Holder of a Note for at least six months may, on behalf of himself and all others similarly situated, petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor Trustee.

(e) If the Trustee shall resign, be removed or become incapable of acting, or if a vacancy shall occur in the office

of Trustee for any cause, the Company, by a Board Resolution, shall promptly appoint a successor Trustee. If, within one year after such resignation, removal or incapability, or the occurrence of such vacancy, a successor Trustee shall be appointed by Act of the Holders of a majority in principal amount of the Outstanding Notes delivered to the Company and the retiring Trustee, the successor Trustee so appointed shall, forthwith upon its acceptance of such appointment, become the successor Trustee and supersede the successor Trustee appointed by the Company. If no successor Trustee shall have been so appointed by the Company or the Holders and accepted appointment in the manner hereinafter provided subject to TIA Section 315(e), any Holder who has been a bona fide Holder of a Note for at least six months may, on behalf of himself and all others similarly situated, petition any court of competent jurisdiction for the appointment of a successor Trustee.

(f) The Company shall give notice of each resignation and each removal of the Trustee and each appointment of a successor Trustee to the Holders of Notes in the manner provided for in Section 106. Each notice shall include the name of the successor Trustee and the address of its Corporate Trust Office.

SECTION 609. *Acceptance of Appointment by Successor.*

Every successor Trustee appointed hereunder shall execute, acknowledge and deliver to the Company and to the retiring Trustee an instrument accepting such appointment, and thereupon the resignation or removal of the retiring Trustee shall become effective and such successor

Trustee, without any further act, deed or conveyance, shall become vested with all the rights, powers, trusts and duties of the retiring Trustee; but, on request of the Company or the successor Trustee, such retiring Trustee shall, upon payment of its charges, execute and deliver an instrument transferring to such successor Trustee all the rights, powers and trusts of the retiring Trustee and shall duly assign, transfer and deliver to such successor Trustee all property and money held by such retiring Trustee hereunder. Upon request of any such successor Trustee, the Company shall execute any and all instruments for more fully and certainly vesting in and confirming to such successor Trustee all such rights, powers and trusts.

No successor Trustee shall accept its appointment unless at the time of such acceptance such successor Trustee shall be qualified under TIA Section 310(b) and eligible under this Article.

SECTION 610. *Merger, Conversion, Consolidation or Succession to Business.*

Any corporation into which the Trustee may be merged or converted or with which it may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Trustee shall be a party, or any corporation succeeding to all or substantially all of the corporate trust business of the Trustee, shall be the successor of the Trustee hereunder, *provided* such corporation shall be otherwise qualified and eligible under this Article, without the execution or filing of any paper or any further act on the part of any of the parties hereto. In case any Notes shall have

been authenticated, but not delivered, by the Trustee then in office, any successor by merger, conversion or consolidation to such authenticating Trustee may adopt such authentication and deliver the Notes so authenticated with the same effect as if such successor Trustee had itself authenticated such Notes. In case any of the Notes shall not have been authenticated by such predecessor Trustee, any successor Trustee may authenticate such Notes either in the name of any predecessor hereunder or in the name of the successor Trustee. In all such cases such certificates shall have the full force and effect that this Indenture provides for the certificate of authentication of the Trustee, *provided, however,* that the right to adopt the certificate of authentication of any predecessor Trustee or to authenticate Notes in the name of any predecessor Trustee shall apply only to its successor or successors by merger, conversion or consolidation.

ARTICLE SEVEN

HOLDERS' LISTS AND REPORTS BY TRUSTEE

SECTION 701. *Disclosure of Names and Addresses of Holders.*

Every Holder of Notes, by receiving and holding the same, agrees with the Company and the Trustee that none of the Company or the Trustee or any agent of either of them shall be held accountable by reason of the disclosure of any such information as to the names and addresses of the Holders in accordance with TIA Section 312, regardless of the source from which such information was derived, and that the Trustee shall not be held accountable by reason of mailing any material pursuant to a request made under TIA Section 312(b).

SECTION 702. *Reports by Trustee.*

Within 60 days after May 1 of each year commencing with the first May 1 after the first issuance of Notes, the Trustee shall transmit to the Holders, in the manner and to the extent provided in TIA Section 313(c), a brief report dated as of such May 1 if required by TIA Section 313(a).

ARTICLE EIGHT

CONSOLIDATION, MERGER AND SALE OF ASSETS

SECTION 801. *Company May Consolidate, Etc., Only on Certain Terms.*

The Company shall not, in a single transaction or through a series of related transactions, consolidate with or merge with or into any other Person or sell, assign, convey, transfer, lease or otherwise dispose of all or substantially all of its properties and assets as an entirety to any Person or Persons or permit any Subsidiary to enter into any such transaction or series of transactions if such transaction or series of transactions, in the aggregate, would result in the sale, assignment, conveyance, transfer, lease or other disposition of all or substantially all of the properties and assets of the Company and its Subsidiaries on a consolidated basis to any Person or Persons, unless at the time and immediately after giving effect thereto:

(1) either (A) the Company will be the surviving corporation or (B) the Person (if other than the Company) formed by such consolidation

or into which the Company or the Company and its Subsidiaries is merged or the Person that acquires by sale, conveyance, transfer, lease or other disposition all or substantially all the properties and assets of the Company or the Company and its Subsidiaries, as the case may be (the "Surviving Entity") (i) shall be a corporation organized and validly existing under the laws of the British Virgin Islands or the United States of America, any state thereof or the District of Columbia, and (ii) shall expressly assume, by a supplemental indenture executed and delivered to the Trustee, in form satisfactory to the Trustee, the Company's obligation for the due and punctual payment of the principal of, premium, if any, interest on and Additional Amounts in respect of all the Notes and the performance and observance of every covenant of this Indenture on the part of the Company to be performed or observed;

(2) immediately after giving effect to such transaction or series of transactions on a pro forma basis (and treating any obligation of the Company or any Subsidiary incurred in connection with or as a result of such transaction or series of transactions as having been incurred at the time of such transaction), no Default or Event of Default shall have occurred and be continuing;

(3) if any of the property or assets of the Company or any of its Subsidiaries would thereupon become subject to any Lien, the provisions of Section 1014 are complied with;

(4) the Company shall have obtained a Rating Confirmation; and

(5) the Company or the Surviving Entity shall have delivered to the Trustee, in form and substance reasonably satisfactory to the Trustee, an Officer's Certificate and an Opinion of Counsel, each stating that such consolidation, merger, sale, assignment, conveyance, transfer, lease or other disposition, and if a supplemental indenture is required in connection with such transaction, such supplemental indenture, comply with the requirements of this Indenture and that all conditions precedent therein provided for relating to such transaction have been complied with and that such supplemental indenture is a legal, valid, binding and enforceable obligation of the new obligor, subject to customary exceptions.

SECTION 802. *Successor Substituted.*

Upon any consolidation or merger, or any sale, assignment, conveyance, transfer, lease or other disposition of all or substantially all of the properties and assets of the Company in accordance with Section 801 in which the Company is not the continuing obligor under this Indenture, the Surviving Entity shall succeed to, and be substituted for, and may exercise every right and power of, the Company under this Indenture, with the same effect as if such successor had been named as the Company herein. When a successor assumes all the obligations of its predecessor under this Indenture and the Notes, the predecessor shall be released from those obligations; *provided* that in the case of a transfer

by lease, the predecessor shall not be released from the payment of principal, premium, if any, interest on and Additional Amounts in respect of the Notes; *provided* that in the case of a transfer by lease, the predecessor shall not be released from the payment of principal and interest on the Notes.

ARTICLE NINE

SUPPLEMENTAL INDENTURES; AMENDMENTS TO SECURITY DOCUMENTS

SECTION 901. *Supplemental Indentures and Amendments to Security Documents, Without Consent of Holders.*

(a) Without the consent of any Holders, the Company, when authorized by a Board Resolution and the Trustee, at any time and from time to time, may enter into one or more indentures supplemental hereto, in form satisfactory to the Trustee, for any of the following purposes:

(1) to evidence the succession of another Person to the Company, or any other obligor on the Notes and the assumption by any such successor of the covenants of the Company, or such obligor contained herein and in the Notes; or

(2) to add to the covenants of the Company, or any other obligor upon the Notes for the benefit of the Holders or to surrender any right or power herein conferred upon the Company or any other obligor upon the Notes, as applicable, in this Indenture, in the Notes; or

(3) to add any additional Events of Default; or

(4) to evidence and provide the acceptance of the appointment of a successor Trustee under this Indenture; or

(5) to cure any ambiguity, or to correct or supplement any provision in this Indenture or in the Notes which may be defective or inconsistent with any other provision in this Indenture or in the Notes, or to make any other provisions with respect to matters or questions arising under this Indenture or under the Notes which shall not be inconsistent with the provisions of this Indenture or the Notes; *provided* that, in each case, such provisions shall not materially adversely affect the interests of the Holders; or

(6) to mortgage, pledge, hypothecate or grant a security interest in favor of the Trustee for the benefit of the Holders of the Notes as additional security for the payment and performance of the Company's obligations under this Indenture, in any property, or assets, including any of which are required to be mortgaged, pledged or hypothecated, or in which a security interest is required to be granted to the Trustee pursuant to this Indenture or otherwise; or

(7) to comply with the requirements of the Commission or the TIA in order to effect or maintain the qualification of this Indenture under the TIA; or

(b) Without the consent of any Holders, the Grantor under the respective Security Documents and the Trustee at any time and from time to time, may enter into any amendment to, or waive any provision of, any Security Document to cure any ambiguity, or to correct or supplement any provision thereof which may be defective or inconsistent with any other provision contained therein or herein or to convey, transfer, assign, mortgage or pledge to the Trustee any additional security thereunder.

SECTION 902. *Supplemental Indentures with Consent of Holders: Amendments to Security Documents.*

(a) With the consent of the Holders of not less than a majority in principal amount of the Outstanding Notes, by Act of said Holders delivered to the Company and the Trustee, (i) the Company, when authorized by a Board Resolution, and the Trustee may enter into an indenture or indentures supplemental hereto for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture or of modifying in any manner the rights of the Holders under this Indenture or of waiving compliance with certain restrictive covenants and provisions under this Indenture and (ii) the Trustee may agree to any amendment, modification, or waiver of any Security Document and any cancellation, termination, amendment or modification of (x) any Specified Agreement (as defined in each Collateral Assignment Agreement) or (y) the Management Services Agreement; *provided, however,* that no such supplemental indenture, amendment, modification or waiver shall, without the consent of the Holder of each Outstanding Note affected thereby:

(1) change the Stated Maturity of the principal of, or any installment of interest on, any Note, or reduce the principal amount thereof or the rate of interest thereon or any premium payable upon the redemption thereof, or change the coin or currency in which the principal of any Note or any premium or the interest thereon is payable, or impair the right to institute suit for the enforcement of any such payment after the Stated Maturity thereof (or, in the case of redemption, on or after the Redemption Date); or,

(2) reduce the percentage in principal amount of the Outstanding Notes, the consent of whose Holders is required for any such supplemental indenture, or the consent of whose Holders is required for any waiver of compliance with certain provisions of this Indenture or certain defaults hereunder and their consequences provided for in this Indenture; or

(3) change the obligation of the Company to pay Additional Amounts; or

(4) permit the release or termination of all or substantially all of the security afforded by the Liens under this Indenture and the Security Documents; or

(5) modify any of the provisions relating to supplemental indentures requiring the consent of holders or relating to the waiver of past defaults

or relating to the waiver of certain covenants, except to increase the percentage of Outstanding Notes required for such actions or to provide that certain other provisions of this Indenture cannot be modified or waived without the consent of the Holder of each Note affected thereby; or

(6) amend, change or modify the obligation of the Company to make and consummate a Change of Control Offer in the event of a Change of Control in accordance with Section 1015 of this Indenture, including amending, changing or modifying any definition relating thereto; or

(7) except as otherwise permitted in this Indenture, consent to the assignment or transfer by the Company of any of its rights or obligations under this Indenture.

(b) With the consent or at the direction of the Holders of not less than 66⅔% in principal amount of the Outstanding Notes, the Trustee may agree to the creation of any Lien on the Collateral or any part thereof or release or terminate any part of the Liens of the Collateral Agent, *provided* that, so long as the Indenture shall not have been discharged, the Trustee shall not permit the release or termination of all or substantially all of the Liens of the Trustee on the Collateral or deprive the Holders of substantially all of the security afforded by the Liens of the Indenture or the Security Documents without the consent of the Holder of each Note Outstanding.

It shall not be necessary for any Act of Holders under this Section to approve the particular form of any proposed supplemental indenture or any amendment, modification or waiver of any Security Document, Specified Agreement or the Management Services Agreement, but it shall be sufficient if such Act shall approve the substance thereof.

SECTION 903. *Execution of Supplemental Indentures.*

In executing, or accepting the additional trusts created by, any supplemental indenture permitted by this Article or the modifications thereby of the trusts created by this Indenture or any amendment, waiver or modification of any document described in Section 902(b), the Trustee shall be entitled to receive, and shall be fully protected in relying upon, an Opinion of Counsel stating that the execution of such supplemental indenture, amendment, modification or waiver is authorized or permitted by this Indenture or such Security Document, as the case may be. The Trustee may, but shall not be obligated to, enter into any such supplemental indenture, amendment, modification or waiver which affects the Trustee's own rights, duties or immunities under this Indenture or otherwise.

SECTION 904. *Effect of Supplemental Indentures; Amendments to Security Documents.*

Upon the execution of any supplemental indenture, amendment, modification or waiver under this Article, this Indenture or the applicable Security Document shall be modified in accordance therewith, and such supplemental indenture, amendment, modification or waiver shall form a

part of this Indenture or applicable Security Document, as the case may be, for all purposes; and every Holder of Notes theretofore or thereafter authenticated and delivered hereunder shall be bound thereby (except as provided in Section 902).

SECTION 905. *Conformity with Trust Indenture Act.*

Every supplemental indenture executed pursuant to this Article shall conform to the requirements of the Trust Indenture Act as then in effect.

SECTION 906. *Reference in Notes to Supplemental Indentures.*

Notes authenticated and delivered after the execution of any supplemental indenture pursuant to this Article may, and shall if required by the Trustee, bear a notation in form approved by the Trustee as to any matter provided for in such supplemental indenture. If the Company shall so determine, new Notes so modified as to conform, in the opinion of the Trustee and the Company, to any such supplemental indenture may be prepared and executed by the Company and authenticated and delivered by the Trustee in exchange for outstanding Notes. Failure to make the appropriate notation or to issue a new Note shall not affect the validity of such amendment.

SECTION 907. *Notice of Supplemental Indentures.*

Promptly after the execution by the Company and the Trustee of any supplemental indenture, amendment, modification or waiver pursuant to the provisions of

Section 902, the Trustee shall give notice thereof to the Holders of each Outstanding Note affected, in the manner provided for in Section 106, setting forth in general terms the substance of such supplemental indenture, amendment, modification or waiver. Failure to provide such notice shall not affect the validity of such amendment.

ARTICLE TEN

COVENANTS

SECTION 1001. *Payment of Principal, Premium, if any, and Interest and Additional Amounts, if any.*

The Company covenants and agrees for the benefit of the Holders that it shall duly and punctually pay the principal of (and premium, if any) and interest (including Additional Interest, if any) and Additional Amounts, if any, on the Notes in accordance with the terms of the Notes and this Indenture.

SECTION 1002. *Maintenance of Office or Agency.*

The Company shall maintain in The City of New York an office or agency where Notes may be presented or surrendered for payment, where Notes may be surrendered for registration of transfer or exchange and where notices and demands to or upon the Company in respect of the Notes and this Indenture may be served. The Corporate Trust Office of the Trustee shall be such office or agency of the Company, unless the Company shall designate and maintain some other office or agency for one or more of such purposes. The Company shall give prompt written notice to the Trustee of

any change in the location of any such office or agency. If at any time the Company shall fail to maintain any such required office or agency or shall fail to furnish the Trustee with the address thereof, such presentations, surrenders, notices and demands may be made or served at the Corporate Trust Office of the Trustee, and the Company hereby appoints the Trustee as its agent to receive all such presentations, surrenders, notices and demands. For so long as the Notes are listed on the Luxembourg Stock Exchange the Company shall maintain a paying agent for the Notes in Luxembourg.

The Company may also from time to time designate one or more other offices or agencies (in or outside of The City of New York) where the Notes may be presented or surrendered for any or all such purposes and may from time to time rescind any such designation; *provided, however,* that no such designation or rescission shall in any manner relieve the Company of its obligation to maintain an office or agency in The City of New York for such purposes. The Company shall give prompt written notice to the Trustee of any such designation or rescission and any change in the location of any such other office or agency.

SECTION 1003. *Money for Note Payments to Be Held in Trust.*

If the Company shall at any time act as its own Paying Agent, it will, on or before each due date of the principal of (or premium, if any), interest or Additional Amounts, if any, on any of the Notes, segregate and hold in trust for the benefit of the Persons entitled thereto a sum sufficient to pay the principal of (or premium, if any) or interest or Additional

Amounts, if any, so becoming due until such sums shall be paid to such Persons or otherwise disposed of as herein provided and will promptly notify the Trustee of its action or failure so to act.

Whenever the Company shall have one or more Paying Agents for the Notes, it will, one Business Day prior to each due date of the principal of (or premium, if any) or interest or Additional Amounts, if any, on any Notes, deposit with a Paying Agent a sum sufficient to pay the principal (and premium, if any) or interest or Additional Amounts, if any, so becoming due, such sum to be held in trust for the benefit of the Persons entitled to such principal, premium or interest or Additional Amounts, if any, and (unless such Paying Agent is the Trustee) the Company will promptly notify the Trustee of such action or any failure so to act.

The Company will cause each Paying Agent (other than the Trustee) to execute and deliver to the Trustee an instrument in which such Paying Agent shall agree with the Trustee, subject to the provisions of this Section, that such Paying Agent will:

(1) hold all sums held by it for the payment of the principal of (and premium, if any) or interest or Additional Amounts, if any, on Notes in trust for the benefit of the Persons entitled thereto until such sums shall be paid to such Persons or otherwise disposed of as herein provided;

(2) give the Trustee notice of any default by the Company (or any other obligor upon the Notes)

in the making of any payment of principal (and premium, if any) or interest or Additional Amounts, if any; and

(3) at any time during the continuance of any such default, upon the written request of the Trustee, forthwith pay to the Trustee all sums so held in trust by such Paying Agent.

The Company may at any time, for the purpose of obtaining the satisfaction and discharge of this Indenture or for any other purpose, pay, or by Company Order direct any Paying Agent to pay, to the Trustee all sums held in trust by the Company or such Paying Agent, such sums to be held by the Trustee upon the same trusts as those upon which such sums were held by the Company or such Paying Agent; and, upon such payment by any Paying Agent to the Trustee, such Paying Agent shall be released from all further liability with respect to such sums.

Any money deposited with the Trustee or any Paying Agent, or then held by the Company, in trust for the payment of the principal of (or premium, if any) or interest or Additional Amounts, if any, on any Note and remaining unclaimed for two years after such principal, premium or interest or Additional Amounts, if any, has become due and payable shall be paid to the Company on Company Request, or (if then held by the Company) shall be discharged from such trust; and the Holder of such Note shall thereafter, as an unsecured general creditor, look only to the Company for payment thereof, and all liability of the Trustee or such Paying Agent with respect to such trust money, and all liability of

the Company as trustee thereof, shall thereupon cease; *provided, however,* that the Trustee or such Paying Agent, before being required to make any such repayment, may at the expense of the Company cause to be published once, in a newspaper published in the English language, customarily published on each Business Day and of general circulation in the Borough of Manhattan, The City of New York, notice that such money remains unclaimed and that, after a date specified therein, which shall not be less than 30 days from the date of such publication, any unclaimed balance of such money then remaining will be repaid to the Company.

SECTION 1004. *Corporate Existence.*

Subject to Article Eight, the Company will do or cause to be done all things necessary to preserve and keep in full force and effect its corporate existence and the rights (charter and statutory) and franchises of the Company and each Subsidiary of the Company; *provided, however,* that the Company shall not be required to preserve any such right or franchise if the Board of Directors shall determine that the preservation thereof is no longer desirable in the conduct of the business of the Company and its Subsidiaries as a whole and that the loss thereof is not disadvantageous in any material respect to the Holders.

SECTION 1005. *Payment of Taxes.*

The Company shall, and shall cause its Subsidiaries to, pay and discharge when due and payable all taxes imposed on it or on its income or profits or on any of its properties except such taxes as are being contested in good faith in appropriate proceedings.

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SECTION 1006. *Maintenance of Properties.*

The Company will cause all properties owned by the Company or any Subsidiary of the Company or used or held for use in the conduct of its business or the business of any such Subsidiary to be maintained and kept in good condition, repair and working order and supplied with all necessary equipment and will cause to be made all necessary repairs, renewals, replacements, betterments and improvements thereof, all as in the judgment of the Company may be necessary so that the business carried on in connection therewith may be properly and advantageously conducted at all times; *provided*, *however,* that nothing in this Section shall prevent the Company or any Subsidiary of the Company from discontinuing the maintenance of any of such properties if such discontinuance is, in the judgment of the Company or such Subsidiary, desirable in the conduct of the business of the Company and its Subsidiaries as a whole and not disadvantageous in any material respect to the Holders.

SECTION 1007. *Maintenance of Insurance.*

The Company will cause each of the Project Toll Road Joint Ventures to maintain insurance policies covering such risks, and in such amounts and with such terms as are normally carried by similarly situated foreign invested companies engaged in the construction, ownership, operation and maintenance of toll roads in the Peoples' Republic of China and to provide the Trustee with evidence of such insurance on an annual basis, which evidence shall be in the form of an Officer's Certificate certifying as to the compliance with this Section 1007.

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SECTION 1008. *Statement by Officers As to Default.*

(a) The Company will deliver to the Trustee, within 180 days after the end of each fiscal year and 90 days after the end of each fiscal semiannual period, a brief certificate from the principal executive officer, principal financial officer or principal accounting officer, as to his or her knowledge of the Company's compliance with all conditions and covenants under this Indenture. For purposes of this Section 1008(a), such compliance shall be determined without regard to any period of grace or requirement of notice under this Indenture.

(b) When any Default or Event of Default has occurred and is continuing under this Indenture, the Company shall deliver to the Trustee by registered or certified mail or by telegram, telex or facsimile transmission an Officer's Certificate specifying such event, notice or other action within five Business Days of its occurrence.

SECTION 1009. *Provision of Reports and Financial Statements.*

(a) If the Company is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, the Company shall submit to the Commission for filing and provide to the Trustee, and, upon request, the Company directly or through the Trustee will provide to the Holders, (i) as soon as available after the end of each fiscal year (but in no event later than 180 days after the close of such fiscal year), annual reports on Form 20-F, including annual consolidated financial statements prepared in accordance with GAAP with an opinion thereon by an internationally

recognized independent public accountant with respect to such year in English, (ii) as soon as available (and in any event, no more than 90 days after the end of each semiannual period), interim consolidated reports, including financial statements (containing a balance sheet, income statement and cash flows statement) prepared in accordance with GAAP for and as of the end of each semiannual interim period covered thereby with comparable financial statements for the comparable period of the immediately preceding fiscal year, in English, and (iii) U.S. GAAP reconciliations for the consolidated financial statements contained in such annual reports on Form 20-F. The Company will also comply with the other provisions of Section 314(a) of the TIA. Such annual and interim reports shall be obtainable at the offices of the Paying Agent in Luxembourg.

(b) At any time when the Company is not subject to Section 13 or 15(d) of the Exchange Act, the Company shall file with the Trustee and upon request, the Company directly or through the Trustee will provide to the Holders of the Notes, such periodic information, documents, financial information and reports as it would be required to file with the Commission to the same extent and on the same basis as if it were subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act and as provided in the foregoing paragraph.

(c) At any time when the Company is not subject to Section 13 or 15(d) of the Exchange Act and is not exempt from reporting pursuant to Rule 12g3-2(b) under the Exchange Act, upon the request of a Holder or beneficial owner of a Note, the Company shall promptly furnish or cause to be furnished Rule 144A Information (as defined below)

to such holder or beneficial owner, to a prospective purchaser of such Note designated by such Holder or beneficial owner or to the Trustee for delivery to such Holder or beneficial owner or a prospective purchaser designated by such Holder or beneficial owner, as the case may be, in order to permit compliance by such Holder or beneficial owner with Rule 144A in connection with the resale of such Note by such Holder or beneficial owner. "Rule 144A Information" shall be such information as is at the time of such proposed purchase specified pursuant to Rule 144A(d)(4) (or any successor provision thereto).

SECTION 1010. *Limitation on Indebtedness.*

The Company will not, and will not permit any Non-Project Toll Road Joint Venture (until after the Non-Project Spin-off Date) or any Restricted Subsidiary, directly or indirectly, to Incur any Indebtedness. Notwithstanding the foregoing, the Company, the Non-Project Toll Road Joint Ventures and the Restricted Subsidiaries, as the case may be, may Incur the following Indebtedness:

(1) Indebtedness of the Company pursuant to the Notes or the Exchange Notes;

(2) Indebtedness of the Company owing to the Holding Company and Incurred as a result of a Capital Contribution as contemplated by Section 1017;

(3) Indebtedness of the Company, any Non-Project Toll Road Joint Venture or any

Restricted Subsidiary owing to the Company or to a Wholly Owned Subsidiary; *provided* that (a) any disposition, pledge or transfer of any such Indebtedness to a Person (other than a disposition, pledge or transfer to the Company or a Wholly Owned Subsidiary of the Company) shall be deemed to be an Incurrence of such Indebtedness not permitted by this clause (3); and (b) any transaction pursuant to which any Wholly Owned Subsidiary of the Company, to which such Indebtedness is owed, ceases to be a Wholly Owned Subsidiary of the Company shall be deemed to be an Incurrence of such Indebtedness that is not permitted by this clause (3);

(4) Obligations of the Company, any Non-Project Toll Road Joint Venture or any Restricted Subsidiary entered into in the ordinary course of business (a) pursuant to Interest Rate Agreements, which obligations do not exceed the aggregate principal amount of Indebtedness of the Company, the Non-Project Toll Road Joint Ventures and the Restricted Subsidiaries, as the case may be, covered by such Interest Rate Agreements, and (b) pursuant to Exchange Rate Contracts entered into by the Company, any Non-Project Toll Road Joint Venture or any of the Restricted Subsidiaries in respect of its (x) assets or (y) obligations, as the case may be, denominated in a foreign currency, which obligations do not increase the aggregate principal amount of any Indebtedness of the Company, the Non-Project Toll Road Joint

Ventures or the Restricted Subsidiaries, as the case may be, covered by such Exchange Rate Contracts, *provided* that, with respect to both clauses (a) and (b) above, neither the Non-Project Toll Road Joint Ventures nor any of the Restricted Subsidiaries may enter into any Interest Rate Agreements or Exchange Rate Contracts other than in respect of their own assets or Indebtedness for which they are the primary obligor;

(5) Indebtedness of any Toll Road Joint Venture owing to any holder of an equity interest. therein (other than a Hong Kong Holding Company) pursuant to the applicable Joint Venture Contract as in effect on the Issue Date; and

(6) Subordinated Indebtedness of Company, which Subordinated Indebtedness shall have a Stated Maturity after the Stated Maturity of the Notes and shall not allow any payment of principal or any sinking fund payment thereon until all obligations of the Company under the Notes shall have been paid in full, *provided* that the Company may only Incur such Subordinated Indebtedness if (a) the net proceeds of such Subordinated Indebtedness are applied to the making of an Additional Joint Venture Capital Contribution within 20 days of the date such Subordinated Indebtedness was Incurred, (b) the creditors in connection with such Subordinated Indebtedness shall have entered into a subordination agreement substantially in the form attached hereto as Exhibit D, and (c) at the

time of Incurrence of such Subordinated Indebtedness, the Company would be permitted to make a Restricted Payment in accordance with Paragraph (a) under Section 1011, *provided, however,* that for purposes only of determining whether the Company may Incur Subordinated Indebtedness pursuant to this clause (6), the Debt Service Coverage Ratio referred to in sub-clause (a)(ii) under Section 1011 shall be not less than 1.75 to 1.

SECTION 1011. *Limitation on Restricted Payments.*

(a) The Company will not, and will not permit any Restricted Subsidiary to, directly or indirectly, make any Restricted Payment unless, at the time of such action and after giving effect thereto, (i) no Default or Event of Default shall have occurred and be continuing or would result therefrom, (ii) the Debt Service Coverage Ratio is not less than 2.25 to 1 as of the most recent Determination Date, (iii) the aggregate amount on deposit in the Interest Payment Account shall be not less than the aggregate amount of interest (including Additional Interest, if any) due and payable on the Notes within 365 days following the most recent Determination Date, and (iv) there shall be on deposit in the Note Redemption Account an amount sufficient to redeem the aggregate principal amount of Notes required to be redeemed within 365 days following the most recent Determination Date, provided that if the Company has met the requirements to make a Restricted Payment pursuant to this Section 1011, the Company may make such Restricted Payment at any time during the period from the Calculation

Date after the most recent Determination Date until the next Determination Date. Notwithstanding the foregoing, the Company will not, and will not permit any Restricted Subsidiary to, directly or indirectly, make any Restricted Payment until each of the following has occurred: (a) the Non-Project Spin-off Date; (b) each of the Project Toll Road Joint Ventures has installed a computerized ticketing system in accordance with, and obtained the certification described in, Section 1024; (c) if the audit report referred to in Section 1022 relating to the Project Toll Road Joint Ventures' toll collection systems refers to any material deficiencies in such toll collection systems, the Trustee shall have received a revised audit report stating that all such deficiencies have been corrected and that no material deficiencies exist on the date of such revised audit report; (d) if the "bring-down" engineer's report referred to in Section 1022 refers to any material repairs to the toll roads operated by the Project Toll Road Joint Ventures which should be made, the Trustee shall have received an engineer's report concluding that all such repairs have been made; (e) in the event that the Guanlong Highway is not completed, collecting tolls and open to traffic along its full length by July 1998, such time as the Guanlong Highway is so completed, collecting tolls and open to traffic; and (f) in the event that the Meishan Expressway is not completed, collecting tolls and open to traffic along its full length by August 1999, such time as the Meishan Expressway is so completed, collecting tolls and open to traffic.

(b) Notwithstanding paragraph (a) above, the Company and any Restricted Subsidiary may take the following actions so long as (in the case of clauses (3) and (4) below) no Default or Event of Default shall have occurred and be continuing or would result therefrom:

(1) the Company may cause its Wholly Owned Subsidiaries to transfer all of the Capital Stock representing their interests in the Non-Project Toll Road Joint Ventures in accordance with Section 1023;

(2) the Company may direct the Trustee to distribute out of the Joint Venture Distribution Account as a dividend to the Holding Company an aggregate amount not greater than the aggregate amount of distributions from the Non-Project Toll Road Joint Ventures made to the Hong Kong Holding Companies and deposited in the Joint Venture Distribution Account;

(3) the Company or any Wholly Owned Subsidiary may make an Investment in any of the Project Toll Road Joint Ventures (by way of any direct or indirect advance, loan or other extension of credit or any purchase or acquisition of any Capital Stock in such Project Toll Road Joint Ventures) to the extent such Investments are required under the applicable Joint Venture Contract as in effect on the Issue Date and are paid in accordance with the terms thereof; *provided* that to the extent that such Investment is made with funds from the Joint Venture Distribution Account, such Investment shall be made within 20 days after withdrawal from the Joint Venture Distribution Account of such funds;

(4) the Company may withdraw amounts remaining in the Construction Funding Account pursuant to the terms described under Section 1305;

(5) (a) each of the Project Toll Road Joint Ventures and the Hong Kong Holding Companies may make distributions, pay dividends, and pay interest and principal on Indebtedness owing to the Hong Kong Holding Companies or the Company, as the case may be, in accordance with the terms of the applicable Joint Venture Contract as in effect on the Issue Date, which distributions, dividends, interest and principal shall be deposited into the Joint Venture Distribution Account in accordance with the terms of the applicable Security Documents, and (b) each of the Project Toll Road Joint Ventures may make distributions, pay dividends, and pay interest and principal on Indebtedness to the Chinese partner of the Joint Venture in accordance with the terms of the applicable Joint Venture Contract as in effect on the Issue Date; and

(6) any Restricted Subsidiary may pay, distribute, reimburse or otherwise transfer any amount to the Company or any Wholly Owned Subsidiary.

SECTION 1012. *Limitation on Restrictions on Distributions from Restricted Subsidiaries.*

Other than pursuant to this Indenture, the Company will not, and will not permit any Restricted Subsidiary to, create

or otherwise cause or permit to exist or become effective any consensual encumbrance or restriction on the ability of any such Restricted Subsidiary to (i) pay dividends or make any other distributions on its Capital Stock or pay any Indebtedness or other obligation owed to the Company or any other Subsidiary of the Company, (ii) make any loans or advances to the Company or any other Subsidiary of the Company, or (iii) transfer any of its property or assets to the Company or any other Subsidiary of the Company.

SECTION 1013. *Limitation on Transactions with Affiliates*.

The Company shall not, and shall not permit any Restricted Subsidiary to, directly or indirectly conduct any business or enter into or permit to exist any transaction or series of similar or related transactions (including the purchase, conveyance, disposition sale, lease or exchange of any property, the rendering of any service or the extension of credit) with any Affiliate of the Company or the Restricted Subsidiary, as the case may be (other than a Wholly Owned Subsidiary or an employee stock ownership plan for the benefit of the Company's employees), except:

(a) in the ordinary course of the Company's or such Restricted Subsidiary's business and on terms no less favorable to the Company or such Restricted Subsidiary than would be obtainable at the time by the Company or such Restricted Subsidiary, as the case may be, for a comparable transaction or series of similar or related transactions in arm's-length dealings with an unrelated third Person ("Equally Favorable Terms"); or

(b) not in the ordinary course of the Company's or such Restricted Subsidiary's business if (i) the terms of such business, transaction or series of transactions are set forth in writing, and (ii)(x) with respect to any such business, transaction or series of similar or related transactions, a majority of the Board of Directors has, by resolution, determined in good faith that such business, or transaction or series of similar or related transactions are on Equally Favorable Terms and (y) with respect to any such business or transaction or series of similar or related transactions having an aggregate value in excess of US$5 million, such business or transaction or series of similar or related transactions has been determined, in the written opinion of an Independent Appraiser, to be fair, from a financial point of view, to the Company or such Restricted Subsidiary.

The foregoing provisions shall not prohibit (i) any transaction between the Company and a Wholly Owned Subsidiary or between Wholly Owned Subsidiaries not otherwise prohibited by the terms of this Indenture; (ii) the making of any Restricted Payment or the Incurrence of Indebtedness which is expressly permitted under Sections 1010 and 1011; (iii) any reasonable payments, awards or grants, in cash or otherwise, pursuant to, or the funding of, employment arrangements approved by the Board of Directors; (iv) payments and transactions pursuant to the Management Services Agreement; and (v) any agreement to do any of the foregoing.

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SECTION 1014. *Limitation on Liens.*

The Company will not, and will not permit any Restricted Subsidiary to, directly or indirectly, create, incur, assume or suffer to exist any Lien of any kind upon any of its or their respective properties, whether owned at the Issue Date of thereafter acquired, other than Permitted Liens.

SECTION 1015. *Purchase of Notes upon Change in Control.*

(a) Upon the occurrence of a Change of Control, the Company shall be obligated to repurchase, at the election of each holder of Notes, all or any part of such holder's Notes at a repurchase price equal to 101% of the principal amount thereof plus accrued and unpaid interest (including Additional Interest, if any), to the date of repurchase (subject to the right of holders of record on the relevant record date to receive interest due on the relevant Interest Payment Date) pursuant to the offer described below (the "Change of Control Offer").

(b) Within 30 days following any Change in Control, the Company shall give to each Holder of the Notes in the manner provided in Section 106 a notice stating:

(1) that a Change in Control has occurred with respect to the Company and that such Holder has the right to require the Company to repurchase all or any part of such Holder's Notes at a repurchase price in cash equal to 101% of the principal amount thereof plus accrued and unpaid interest (including Additional Interest, if any),

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to the date of repurchase (subject to the right of Holders of record on the relevant record date to receive interest due on the relevant interest payment date);

(2) the circumstances and relevant facts regarding such Change in Control (including but not limited to information with respect to pro forma historical income, cash flow and capitalization after giving effect to such Change in Control, if applicable);

(3) the repurchase date (the "Repurchase Date") (which, except as otherwise required by applicable law, will be no earlier than 30 days nor later than 60 days from the date such notice is mailed); and

(4) the instructions a Holder must follow in order to have such Holder's Notes repurchased in accordance with paragraph (c) of this Section.

(c) Holders electing to have Notes purchased will be required to surrender such Notes to the Company at the address specified in the notice at least five Business Days prior to the Repurchase Date. Holders will be entitled to withdraw their election if the Company receives, not later than three Business Days prior to the Repurchase Date, a telegram, telex, facsimile transmission or letter setting forth the name of the Holder, the principal amount of the Notes delivered for purchase by the Holder as to which his election is to be withdrawn, and a statement that such Holder is

withdrawing his election to have such Notes purchased. Holders whose Notes are purchased only in part will be issued new Notes equal in principal amount to the unpurchased portion of the Notes surrendered.

(d) The Company will comply with the applicable tender offer laws, rules and regulations, including Rule 14e-1 under the Exchange Act, and any other applicable securities laws and regulations and any applicable requirements of any securities exchange on which the Notes are listed in connection with a Change of Control Offer. To the extent that the provisions of any securities laws or regulations or any applicable requirements of any securities exchange on which the Notes are listed conflict with the provisions of this Indenture, the Company will comply with the applicable securities laws and regulations and any applicable requirements of any securities exchange on which the Notes are listed and shall not be deemed to have breached its obligations described in this Indenture by virtue thereof.

(e) The Company shall not, and shall not permit any Restricted Subsidiary to, create or permit to exist or become effective any restriction (other than restrictions existing under Indebtedness or the Security Documents as in effect on the date of this Indenture) that would materially impair the ability of the Company to make a Change of Control Offer to purchase the Notes or, if such Change of Control Offer is made, to pay for the Notes tendered for purchase.

SECTION 1016. *Limitation on Sales of Assets*.

(a) The Company will not, and will not permit any Restricted Subsidiary, to make any Asset Disposition, other

than to the Company or a Wholly Owned Subsidiary, unless the fair market value (as determined in good faith by the Board of Directors, as evidenced by a board resolution) of any asset, property or Capital Stock disposed of in any Asset Disposition, together with the fair market value of all other assets, property or Capital Stock sold, transferred or otherwise disposed of in Asset Dispositions, during the four full fiscal quarters immediately preceding the date of the proposed Asset Disposition, is less than US$5 million, *provided, however,* that neither the Company nor any Restricted Subsidiary will be permitted to sell, transfer or otherwise dispose of any Collateral and *provided further* that no Asset Disposition may be made until the Company has delivered to the Trustee a certification of an internationally recognized independent auditor, that on a pro forma basis after giving effect to such Asset Disposition, the Cash Flow from the remaining assets would have resulted in a Debt Service Coverage Ratio of not less than 1.75 to 1.

(b) Notwithstanding the foregoing, the Company and its Restricted Subsidiaries shall be permitted to (i) engage in sales of systems, equipment and other related toll road assets so long as such sales arise from the upgrade or improvement of existing facilities, and (ii) dispose of the Company's indirect interests in the Non-Project Toll Road Joint Ventures in accordance with Section 1011(b)(1) of this Indenture.

SECTION 1017. *Maintenance of Debt Service Coverage Ratio*.

So long as any amounts are Outstanding under the Notes, the Company will maintain after the first anniversary of the

Issue Date a Debt Service Coverage Ratio of not less than 1.75 to 1. In the event that the Debt Service Coverage Ratio on any Determination Date after the first anniversary of the Issue Date is less than 1.75 to 1, the Holding Company or Traffic Stream (China), as the case may be, shall make a Capital Contribution to the Company in the aggregate amount specified below. Any such Capital Contribution shall be deposited in the Joint Venture Distribution Account within 30 days after the Calculation Date with respect to such Determination Date. The amount of the required Capital Contribution referred to above shall be determined by the Company and shall be equal to the lesser of (x) an amount, if included in the Company's Cash Flow for the period over which the Company's Debt Service Coverage Ratio is calculated on such Determination Date, that would have caused such Debt Service Coverage Ratio to be 1.75 to 1.00 and (y) US$30 million less the amount of any Capital Contributions previously made by the Holding Company and Traffic Stream (China). If the Holding Company or Traffic Stream (China), as the case may be, shall have made a Capital Contribution in an aggregate amount not less than the amount specified in clause (x) above within the 30-day period specified above, the Company shall not be considered to have violated this Section 1017 as of such Determination Date.

SECTION 1018. *Limitation on Nature of Business of Company, Hong Kong Holding Companies and Toll Road Joint Ventures*.

The Company will not, and will not permit the Hong Kong Holding Companies to, engage in any business activity or undertake any other activity other than the direct or indirect

ownership and management of its interests in the Toll Road Joint Ventures. The Project Toll Road Joint Ventures will not engage in any business activity or undertake any other activity other than the construction, ownership, operation and maintenance of the toll roads as well as any other activity contemplated under the Joint Venture Contracts as in effect on the Issue Date.

SECTION 1019. *Limitation on Ownership of Interests in Toll Road Joint Ventures*.

The Company shall hold its equity interests in the Project Toll Road Joint Ventures only through the Hong Kong Holding Companies, which shall remain Wholly Owned Subsidiaries of the Company.

SECTION 1020. *Maintenance of Ownership in Subsidiaries and Joint Ventures*.

The Company shall maintain its indirect ownership interests, and shall cause the Hong Kong Holding Companies to maintain their direct ownership interests in the Project Toll Road Joint Ventures at the percentage level directly or indirectly owned on the Issue Date. The Company shall cause the Hong Kong Holding Companies to not consent to any amendment to the terms of the Joint Venture Contracts with respect to distribution of profits, management or rights on liquidation in such a manner that is or would be materially adverse to Holders of the Notes. The Company shall not amend the Articles of Association of the Hong Kong Holding Companies in a manner that is or would be materially adverse to Holders of the Notes.

SECTION 1021. *Maintenance of Ownership in the Company.*

Following completion of the Bermuda Share Swap, the Holding Company shall maintain its ownership interest in the Company (through its ownership interest in Traffic Stream (China)) at 100% so long as any of the Notes remain Outstanding.

SECTION 1022. *Operation and Maintenance; Engineering Reports; Audit of Toll Collection System.*

(a) The Company shall, and shall cause each of the Project Toll Road Joint Ventures to operate and maintain each Toll Road in accordance with prudent industry operating and maintenance standards and practices generally accepted in the operation of toll road projects. The Company shall engage an independent engineering firm to complete an engineering report on the status of the toll roads under construction and on the condition of the toll roads operated by the Project Toll Road Joint Ventures, with a "bring-down" report identifying all material repairs which, in such engineering firm's best judgment, should be made to the Toll Roads, such "bring-down" report to be delivered to the Trustee every four years. The Company will cause the Project Toll Road Joint Ventures to make any and all repairs to the Toll Roads which repairs are identified as necessary in the independent engineering firm's "bring-down" report.

(b) The Company shall engage an internationally recognized auditing firm to audit, in connection with the preparation of the Company's annual audited financial

statements, the toll collections system of each of the Project Toll Roads and to deliver such audit to the Trustee. In the event that such audit discloses material deficiencies in any of the Project Toll Road toll collection systems then the Company shall have 60 days to cure such material deficiency as evidenced by the delivery of a certification of the auditing firm to the Trustee to the effect that such material deficiency has been rectified.

SECTION 1023. *Disposition of Non-Project Toll Road Joint Venture.*

The Company will use its best efforts to cause the Hong Kong Holding Companies to transfer all of the Capital Stock representing their interests in the Non-Project Toll Road Joint Ventures to a Person that is not owned, directly or indirectly, by the Company not later than eighteen months after the Issue Date.

SECTION 1024. *Installation and Certification of Computerized Ticketing System; Relocation of Toll Booth.*

The Company will use its best efforts to cause each Project Toll Road Joint Venture to install a computerized ticketing system, and will use its best efforts to obtain a certification from an independent expert in traffic consulting to the effect that such system is fully installed and operational and conforms in all material respects to standard industry specifications, no later than the dates specified for each of the respective Toll Roads in the following schedule:

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Toll Road	**Certification Date**
Yanwei Highway	June 30, 1998
Shaonan Highway	June 30, 1998
Guangzhan Highway (Kaiping Section)	July 31, 1998
Yanwei Expressway	September 30, 1998
Guanlong Highway	September 30, 1998
Meishan Expressway (Meizhou Section)	September 30, 1999

In addition, the Company will use its best efforts to cause the Project Toll Road Joint Ventures operating the Yanwei Highway to relocate the toll booth on the Yantai end of the Yanwei Highway to a new site located within ten kilometers of the center of Yantai.

SECTION 1025. *Government Approvals; Compliance with Laws.*

The Company shall, and shall cause each of its Subsidiaries to, at all times (i) obtain and maintain in full force and effect all government authorizations, approvals and consents relating to any Project Toll Road Joint Venture and (ii) preserve and maintain good and valid title to its properties and assets (subject to the Section 1014), except in any such case where any failure to comply with clause (i) or (ii) would not reasonably be expected to have a material adverse effect on the business or results of operations of the Company and its Subsidiaries, taken as a whole, or the ability of the Company to perform its obligations under this Indenture or the Notes.

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The Company shall, and shall cause each of its Subsidiaries to, comply with all applicable laws, rules, regulations and orders of, and all applicable restrictions imposed by, any governmental authority or regulatory body in respect of the conduct of its business and the ownership of its properties, except to the extent that any failure to comply therewith would not reasonably be expected to have a material adverse effect on the business or results of operations of the Company and its Subsidiaries, taken as a whole, or the ability of the Company to perform its obligations under this Indenture or the Notes.

SECTION 1026. *Payment of Additional Amounts.*

All payments of principal of, premium, if any, and interest (including Additional Interest, if any) on each Note shall be made free and clear of, and without withholding or deduction for, any taxes, duties, assessments or governmental charges of whatever nature imposed, levied, collected, withheld or assessed by or within the British Virgin Islands, the PRC or Hong Kong or any authority therein or thereof having power to tax, unless such withholding or deduction is required by law or by regulation or governmental policy having the force of law. In the event that any such withholding or deduction in respect of principal, premium or interest is so required, the Company shall pay such additional amounts ("Additional Amounts") as will result in receipt by each holder of any Note of such amounts as would have been received by such holder or the beneficial owner with respect to such Note had no such withholding or deduction been required, except that no Additional Amounts shall be payable:

(a) for or on account of:

(1) any tax, duty, assessment or other governmental charge that would not have been imposed but for

(A) the existence of any present or former connection between such holder or the beneficial owner of such Note and the British Virgin Islands, the PRC or Hong Kong, as the case may be, other than merely holding such Note or receiving payments or enforcing rights in respect thereof, including, without limitation, such holder or the beneficial owner of such Note being or having been a national, domiciliary or resident of or treated as a resident thereof or being or having been present or engaged in a trade or business therein or having or having had a permanent establishment therein; or

(B) the presentation of such Note (where presentation is required) more than 30 days after the date on which the payment in respect of such Note became due and payable or provided for, whichever is later, except to the extent that such holder would have been entitled to such Additional Amounts if it had presented such Note for payment on any day within such period of 30 days;

(2) any estate, inheritance, gift, sale, transfer, personal property or similar tax, assessment or other governmental charge;

(3) any tax, assessment or other governmental charge that is imposed or withheld by reason of the failure of such holder or the beneficial owner of such Note to comply with a request by the Company addressed to such holder (A) to provide information concerning the nationality, residence or identity of such holder or such beneficial owner or (B) to make any declaration or other similar claim or satisfy any information or reporting requirement, which, in the case of (A) or (B), is required or imposed by a statute, treaty, regulation or administrative practice of the taxing jurisdiction as a precondition to exemption from all or part of such tax, assessment or other governmental charge; or

(4) any combination of items (1), (2) and (3); or

(b) with respect to any payment of the principal of, premium, if any, or interest on such Note to such holder (including a fiduciary or partnership) to the extent that the beneficial owner of such Note would not have been entitled to such Additional Amounts had it been the holder of the Note.

(c) At least 30 Business Days prior to each Interest Payment Date if there has been any change of law which may result in the payment by the Company of Additional

Amounts after the date hereof or prior to such Interest Payment Date, as the case may be, the Company shall furnish the Trustee an Officer's Certificate instructing the Trustee as to any circumstances in which payments of principal of or interest on any Note (including Additional Amounts) due on such date shall be subject to deduction or withholding for or on account of any taxes and the rate of any such deduction or withholding. The Company covenants to indemnify the Trustee and any other Paying Agents for, and to hold each harmless against, any loss, liability or expense reasonably incurred without negligence, bad faith or wilful misconduct on their part, arising out of or in connection with actions taken or not taken by any of them in reliance on any certificate furnished to them pursuant to this paragraph or the failure to furnish any such certificate. The obligations of the Company under this preceding sentence shall survive payment of all the Notes, the satisfaction and discharge of this Indenture and the resignation or removal of the Trustee, the Registrar or any Paying Agent. Any certificate required by this Section to be provided to the Trustee and any other Paying Agent shall be deemed to be duly provided if telecopied to the Trustee and such other Paying Agent. Upon request, the Company shall provide the Trustee with documentation reasonably satisfactory to the Trustee evidencing the payment of taxes in respect of which the Company has paid any Additional Amounts. Copies of such documentation shall be made available by the Trustee to the Holders or the other Paying Agents, as applicable, upon request therefor.

Whenever there is mentioned, in any context, the payment of principal, premium or interest in respect of any Note or the net proceeds received on the sale or exchange of

any Note, such mention shall be deemed to include the payment of Additional Amounts provided for in this Indenture to the extent that, in such context, Additional Amounts are, were or would be payable in respect thereof pursuant to this Indenture.

ARTICLE ELEVEN

REDEMPTION OF NOTES

SECTION 1101. *Right of Redemption.*

(a) The Notes may be redeemed at the option of the Company, subject to the conditions and at the Redemption Prices specified in the form of Note under the caption "5. Redemption — Optional Redemption", together with accrued interest (including Additional Interest, if any) to the Redemption Date and Additional Amounts, if any.

(b) The Notes shall be redeemed on the dates and at the Redemption Prices specified in the form of Note under the caption "5. Redemption — Mandatory Redemption", together with accrued interest (including Additional Interest, if any) to the Mandatory Redemption Date and Additional Amounts, if any.

SECTION 1102. *Applicability of Article.*

Redemption of Notes at the election of the Company or otherwise, as permitted or required by any provision of this Indenture, shall be made in accordance with such provision and this Article.

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SECTION 1103. *Election to Redeem; Notice to Trustee.*

The election of the Company to redeem any Notes pursuant to Section 1101(a) shall be evidenced by a Board Resolution. In case of any redemption at the election of the Company, the Company shall, at least 60 days prior to the Redemption Date fixed by the Company (unless a shorter notice shall be satisfactory to the Trustee), notify the Trustee in writing of such Redemption Date and of the principal amount of Notes to be redeemed and shall deliver to the Trustee such documentation and records as shall enable the Trustee to select the Notes to be redeemed pursuant to Section 1104.

SECTION 1104. *Selection by Trustee of Notes to Be Redeemed.*

If less than all the Notes are to be redeemed, the particular Notes to be redeemed shall be selected not more than 60 days prior to the Redemption Date by the Trustee, from the Outstanding Notes not previously called for redemption, by such method as the Trustee shall deem fair and appropriate and which may provide for the selection for redemption of portions of the principal of Notes; *provided, however,* that no such partial redemption shall reduce the portion of the principal amount of a Note not redeemed to less than $1,000.

The Trustee shall promptly notify the Company in writing of the Notes selected for redemption and, in the case of any Notes selected for partial redemption, the principal amount thereof to be redeemed.

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For all purposes of this Indenture, unless the context otherwise requires, all provisions relating to redemption of Notes shall relate, in the case of any Note redeemed or to be redeemed only in part, to the portion of the principal amount of such Note which has been or is to be redeemed.

SECTION 1105. *Notice of Redemption.*

Notice of redemption shall be given in the manner provided for in Section 106 not less than 30 nor more than 60 days prior to the Redemption Date, to each Holder of Notes to be redeemed.

All notices of redemption shall state:

(1) the Redemption Date,

(2) the Redemption Price and the amount of accrued interest to the Redemption Date payable as provided in Section 1107, if any,

(3) if less than all Outstanding Notes are to be redeemed, the identification (and, in the case of a partial redemption, the principal amounts) of the particular Notes to be redeemed,

(4) in case any Note is to be redeemed in part only, the notice which relates to such Note shall state that on and after the Redemption Date, upon surrender of such Note, the Holder will receive, without charge, a new Note or Notes of authorized denominations for the principal amount thereof remaining unredeemed,

(5) that on the Redemption Date, the Redemption Price (and accrued interest, if any, to the Redemption Date payable as provided in Section 1107) will become due and payable upon each such Note, or the portion thereof, to be redeemed, and that interest thereon will cease to accrue on and after said date, and

(6) the place or places where such Notes are to be surrendered for payment of the Redemption Price and accrued interest, if any.

Notice of redemption of Notes to be redeemed at the election of the Company shall be given by the Company or, at the Company's request, by the Trustee in the name and at the expense of the Company.

SECTION 1106. *Deposit of Redemption Price.*

Prior to any Redemption Date, the Company shall deposit with the Trustee or with a Paying Agent (or, if the Company is acting as its own Paying Agent, segregate and hold in trust as provided in Section 1003) an amount of money sufficient to pay the Redemption Price of, and any applicable Additional Amounts and accrued interest on, all the Notes which are to be redeemed on that date.

SECTION 1107. *Notes Payable on Redemption Date.*

Notice of redemption having been given as aforesaid, the Notes so to be redeemed shall, on the Redemption Date, become due and payable at the Redemption Price therein specified (together with accrued interest, if any, to the

Redemption Date and Additional Amounts, if any), and from and after such date (unless the Company shall default in the payment of the Redemption Price, accrued interest and Additional Amounts, if any) such Notes shall cease to bear interest. Upon surrender of any such Note for redemption in accordance with said notice, such Note shall be paid by the Company at the Redemption Price, together with accrued interest, if any, to the Redemption Date and Additional Amounts, if any; *provided, however,* that installments of interest whose Stated Maturity is on or prior to the Redemption Date shall be payable to the Holders of such Notes, or one or more Predecessor Notes, registered as such at the close of business on the relevant Record Dates according to their terms and the provisions of Section 309.

If any Note called for redemption shall not be so paid upon surrender thereof for redemption, the principal (and premium, if any) shall, until paid, bear interest from the Redemption Date at the rate borne by the Notes.

ARTICLE TWELVE

DEFEASANCE AND COVENANT DEFEASANCE

SECTION 1201. *Company's Option to Effect Defeasance or Covenant Defeasance.*

The Company may, at its option and, at any time, with respect to the Notes, elect to have either Section 1202 or Section 1203 be applied to all Outstanding Notes upon compliance with the conditions set forth below in this Article Twelve.

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SECTION 1202. *Defeasance and Discharge.*

Upon the Company's exercise under Section 1201 of the option applicable to this Section 1202, the Company shall be deemed to have been discharged from its obligations with respect to all Outstanding Notes on the date the conditions set forth in Section 1204 are satisfied (hereinafter, "defeasance"). For this purpose, such defeasance means that the Company shall be deemed to have paid and discharged the entire Indebtedness represented by the Outstanding Notes, which shall thereafter be deemed to be "Outstanding" only for the purposes of Section 1205 and the other Sections of this Indenture referred to in (A) and (B) below, and to have satisfied all its other obligations under such Notes and this Indenture insofar as such Notes are concerned (and the Trustee, at the request and expense of the Company, shall execute proper instruments acknowledging the same), except for the following which shall survive until otherwise terminated or discharged hereunder: (A) the rights of Holders of Outstanding Notes to receive, solely from the trust fund described in Section 1204 and as more fully set forth in such Section, payments in respect of the principal of (and premium, if any, on), interest on and Additional Amounts, if any, in respect of such Notes when such payments are due, (B) the Company's obligations with respect to such Notes under Sections 112, 304, 305, 306, 307, 308, 515, 608(e), 1002, 1003 and 1009, (C) the rights, powers, trusts, duties and immunities of the Trustee hereunder and (D) this Article Twelve. Subject to compliance with this Article Twelve, the Company may exercise its option under this Section 1202 notwithstanding the prior exercise of its option under Section 1203 with respect to the Notes.

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SECTION 1203. *Covenant Defeasance.*

Upon the Company's exercise under Section 1201 of the option applicable to this Section 1203, the Company shall be released from its obligations under any covenant contained in Section 801(a) and in Sections 1007 through 1024 with respect to the outstanding Notes on and after the date the conditions set forth below are satisfied (hereinafter, "covenant defeasance"), and the Notes shall thereafter be deemed not to be "Outstanding" for the purposes of any direction, waiver, consent or declaration or Act of Holders (and the consequences of any thereof) in connection with such covenants, but shall continue to be deemed "Outstanding" for all other purposes hereunder. For this purpose, such covenant defeasance means that, with respect to the Outstanding Notes, the Company may omit to comply with and shall have no liability in respect of any term, condition or limitation set forth in any such covenant, whether directly or indirectly, by reason of any reference elsewhere herein to any such covenant or by reason of any reference in any such covenant to any other provision herein or in any other document and such omission to comply shall not constitute a Default or an Event of Default under Section 501(3) and 501(4), but, except as specified above, the remainder of this Indenture and such Notes shall be unaffected thereby.

SECTION 1204. *Conditions to Defeasance or Covenant Defeasance.*

The following shall be the conditions to application of either Section 1202 or Section 1203 to the Outstanding Notes:

(1) The Company shall irrevocably have deposited or caused to be deposited with the

Trustee (or another trustee satisfying the requirements of Section 607 who shall agree to comply with the provisions of this Article Twelve applicable to it) as trust funds in trust for the purpose of making the following payments, specifically pledged as security for, and dedicated solely to, the benefit of the Holders of such Notes, (A) cash in U.S. dollars, or (B) U.S. Government Obligations which through the scheduled payment of principal and interest in respect thereof in accordance with their terms will provide, not later than one day before the due date of any payment, money in an amount, or (C) a combination thereof, in such amounts as will be sufficient, in the opinion of an internationally recognized firm of independent public accountants expressed in a written certification thereof delivered to the Trustee, to pay and discharge, and which shall be applied by the Trustee (or other qualifying trustee) to pay and discharge, (i) the principal of (and premium, if any), interest on and all Additional Amounts then due or known to become due on the Outstanding Notes on the Stated Maturity (or Redemption Date, if applicable) of such principal (and premium, if any) or installment of interest and (ii) any mandatory redemption payments or analogous payments applicable to the Outstanding Notes on the day on which such payments are due and payable in accordance with the terms of this Indenture and of such Notes; *provided* that the Trustee shall have been irrevocably instructed to apply such money or the

proceeds of such U.S. Government Obligations to said payments with respect to the Notes.

(2) In the case of an election under Section 1202, no Default or Event of Default with respect to the Notes shall have occurred and be continuing on the date of such deposit.

(3) Such defeasance or covenant defeasance shall not result in a breach or violation of, or constitute a default under, this Indenture or any other material agreement or instrument to which the Company is a party or by which it is bound.

(4) In the case of an election under Section 1202, the Company shall have delivered to the Trustee an Opinion of Counsel stating that (x) the Company has received from, or there has been published by, the Internal Revenue Service a ruling, or (y) since the date of this Indenture, there has been a change in the applicable U.S. federal income tax law, in either case to the effect that, and based thereon such opinion shall confirm that, the holders of the Outstanding Notes will not recognize income, gain or loss for U.S. federal income tax purposes as a result of such defeasance and will be subject to federal income tax on the same amounts, in the same manner and at the same times as would have been the case if such defeasance had not occurred.

(5) In the case of an election under Section 1203, the Company shall have delivered to the

Trustee an Opinion of Counsel to the effect that the Holders of the Outstanding Notes will not recognize income, gain or loss for U.S. federal income tax purposes as a result of such covenant defeasance and will be subject to U.S. federal income tax on the same amounts, in the same manner and at the same times as would have been the case if such covenant defeasance had not occurred.

(6) The Company shall have delivered to the Trustee an Officer's Certificate and an Opinion of Counsel, each stating that all conditions precedent provided for relating to either the defeasance under Section 1202 or the covenant defeasance under Section 1203, as the case may be, have been complied with.

SECTION 1205. *Deposited Money and U.S. Government Obligations to Be Held in Trust; Other Miscellaneous Provisions.*

Subject to the provisions of the last paragraph of Section 1003, all money and U.S. Government Obligations (including the proceeds thereof) deposited with the Trustee (or other qualifying trustee, collectively for purposes of this Section 1205, the "Trustee") pursuant to Section 1204 in respect of the Outstanding Notes shall be held in trust and applied by the Trustee, in accordance with the provisions of such Notes and this Indenture, to the payment, either directly or through any Paying Agent (including the Company acting as its own Paying Agent) as the Trustee may determine, to the Holders of such Notes of all sums due and to become due thereon in

respect of principal (and premium, if any) and interest, and Additional Amounts payable under then applicable law, but such money need not be segregated from other funds except to the extent required by law.

The Company shall pay and indemnify the Trustee against any tax, fee or other charge imposed on or assessed against the U.S. Governmental Obligations deposited pursuant to Section 1204 or the principal and interest received in respect thereof other than any such tax, fee or other charge which by law is for the account of the Holders of the Outstanding Notes.

Anything in this Article Twelve to the contrary notwithstanding, the Trustee shall deliver or pay to the Company from time to time upon Company Request any money or U.S. Government Obligations held by it as provided in Section 1204 which, in the opinion of a nationally recognized firm of independent public accountants expressed in a written certification thereof delivered to the Trustee, are in excess of the amount thereof which would then be required to be deposited to effect an equivalent defeasance or covenant defeasance, as applicable, in accordance with this Article Twelve.

SECTION 1206. *Reinstatement.*

If the Trustee or any Paying Agent is unable to apply any money in accordance with Section 1205 by reason of any order or judgment of any court or governmental authority enjoining, restraining or otherwise prohibiting such application, then the Company's obligations under this Indenture and the Notes shall be revived and reinstated as

though no deposit had occurred pursuant to Section 1202 or 1203, as the case may be, until such time as the Trustee or Paying Agent is permitted to apply all such money in accordance with Section 1205; *provided, however,* that if the Company makes any payment of principal of (or premium, if any) or interest on any Note following the reinstatement of its obligations, the Company shall be subrogated to the rights of the Holders of such Notes to receive such payment from the money held by the Trustee or Paying Agent.

ARTICLE THIRTEEN

SECURITY

SECTION 1301. *Collateral.*

As security for the payment and performance by the Company of its obligations under this Indenture and the Notes, upon the terms and conditions set forth in this Indenture, (A) the Company hereby grants to, and charges by way of a first fixed charge in favor of, the Trustee for the benefit of the Holders of the Notes a first priority security interest in all the Company's rights, title and interest in and to (i) the Debt Service Reserve Account, the Construction Funding Account, the Joint Venture Distribution Account and the Note Redemption Account and all amounts deposited therein at any time (the "Collateral Accounts"); and (ii) all Dollar Permitted Investments made with amounts on deposit in the Collateral Accounts; (B) the Company will grant or cause to be granted, and will charge or cause to be charged by way of a first fixed charge, (i) all of the issued and outstanding capital stock of the Hong Kong Holding

Companies pursuant to the Mortgage of Shares (ii) all sums and other monies from time to time owing from a Hong Kong Holding Company to the Company pursuant to the Assignment of Receivables, (iii) the rights of the Hong Kong Holding Companies to distributable cash flows from the Project Toll Road Joint Ventures in accordance with the applicable Joint Venture Contracts and the other collateral pursuant to and as specified in the Collateral Assignment Agreements; (iv) all of the rights of Drew Services Limited under the Management Services Agreement with respect to fees for management services rendered to the benefit of the Project Toll Road Joint Ventures pursuant to the Service Fee Pledge Agreement; and (v) all distributions, revenues, products, substitutions, benefits, profits and proceeds, in whatever form, of any of the foregoing. The Holders of the Notes will have a claim on the Collateral in respect of the Notes held by them that is prior to the claims of all other creditors of the Company.

SECTION 1302. *Recording, Etc.*

The Company will cause, at its own expense, the Collateral Accounts and this Indenture and all amendments or supplements thereto to be registered, recorded and filed or re-recorded, re-filed and renewed in such manner and in such place or places, if any, as may be required by law in order fully to preserve and protect the security interests created under the Collateral Accounts and to effectuate and preserve the security therein granted to the Trustee hereunder for the benefit of the Holders.

The Company will comply with all applicable provisions of the TIA, including, without limitation, Section 314(b) of the TIA.

SECTION 1303. *Investment of Funds in Collateral Accounts.*

So long as no Event of Default shall have occurred and be continuing, all funds in the Collateral Accounts shall be invested and reinvested by the Trustee, at the instructions of the Company, in Dollar Permitted Investments. If any Event of Default shall have occurred and be continuing, the funds in the Collateral Accounts shall be invested and reinvested in Dollar Permitted Investments by the Trustee.

SECTION 1304. *Debt Service Reserve Account.*

The Trustee will establish a Debt Service Reserve Account for the Notes on or before the Issue Date. On the Issue Date, the Company will cause to be deposited with the Trustee for deposit into the Debt Service Reserve Account an amount in U.S. Dollars equal to the amount of interest due and payable on the Notes on the next succeeding Interest Payment Date. If on any Interest Payment Date there shall not be in the Debt Service Reserve Account an amount equal to or greater than the amount of interest (including Additional Interest, if any) due and payable on the next succeeding Interest Payment Date, the Company shall within 30 days of such Interest Payment Date deposit into the Debt Service Reserve Account an amount which, when added to the amount already in the Debt Service Reserve Account, will equal the amount of interest (including Additional Interest, if any) due

and payable on the Notes on the next succeeding Interest Payment Date. Additional Interest shall be included in calculating interest due and payable on the next succeeding Interest Payment Date only to the extent that Additional Interest has begun to accrue on the Notes. Amounts on deposit in the Debt Service Reserve Account in excess of the amount of interest due on the next succeeding Interest Payment Date shall be transferred to the Joint Venture Distribution Account on each Interest Payment Date.

SECTION 1305. *Construction Funding Account.*

The Trustee will establish the Construction Funding Account for the Notes on or before the Issue Date. On the Issue Date, the Company will cause to be deposited with the Trustee for deposit into the Construction Funding Account US$105,131,250.

Amounts on deposit in the Construction Funding Account may only be withdrawn upon receipt by the Trustee of an Officer's Certificate specifying the amount of funds to be withdrawn and that such funds are required to be, and will be, contributed by the Company or its Subsidiary in respect of a Project Toll Road Joint Venture. In addition, on or after the first Business Day of 2000, the Company may, upon written request in the form of an Officer's Certificate certifying that there has not been a 1999 Devaluation, withdraw from the Construction Funding Account 50% of the Excess Project Construction Funds held in the Construction Funding Account on the last Business Day of 1999 and apply such funds at its discretion without regard to Section 1011; *provided, however,* that if the Trustee shall

receive an Officer's Certificate stating that a 1999 Devaluation shall have occurred, all of the Excess Project Construction Funds shall be transferred into the Joint Venture Distribution Account. On or after the first Business Day of 2001, the Company may, upon written request in the form of an Officer's Certificate certifying that there has not been a 2000 Devaluation, withdraw from the Construction Funding Account all of the remaining Excess Project Construction Funds held in the Construction Funding Account and apply such funds at its discretion without regard to Section 1011; *provided, however,* that if the Trustee shall receive an Officer's Certificate stating that a 2000 Devaluation shall have occurred, all of the Excess Project Construction Funds remaining in the Construction Funding Account shall be transferred into the Joint Venture Distribution Account. The Trustee shall have no duty to determine whether a 1999 Devaluation or a 2000 Devaluation has occurred but may rely conclusively on an Officer's Certificate as to such matters.

Interest earned and received by the Trustee on amounts on deposit in the Construction Funding Account shall be transferred to the Joint Venture Distribution account on each Interest Payment Date.

Notwithstanding the foregoing, no amounts may be released from the Construction Funding Account if an Event of Default has occurred and is continuing.

SECTION 1306. *Joint Venture Distribution Account.*

The Trustee will establish the Joint Venture Distribution Account on or before the Issue Date. Pursuant to the terms

of the Collateral Assignment Agreements, the Project Toll Road Joint Ventures will deposit into the Joint Venture Distribution Account in U.S. Dollars all amounts in respect of distributions payable to the Hong Kong Holding Companies pursuant to the terms of the applicable Joint Venture Contracts. In addition, Capital Contributions made pursuant to Section 1017 and received by the Trustee shall be deposited in the Joint Venture Distribution Account. The Trustee shall first allocate amounts in the Joint Venture Distribution Account to a segregated sub-account (the "Interest Payment Account") up to the amount of interest (including Additional Interest, if any) due and payable on the Notes within 180 days of the later of (i) the Issue Date and (ii) the most recent Interest Payment Date. Amounts on deposit in the Joint Venture Distribution Account may only be withdrawn (a) by the Trustee on each Interest Payment Date in an amount equal to the amount of interest (including Additional Interest, if any) due and payable on the Notes on that Interest Payment Date, (b) by the Trustee on each Mandatory Redemption Date in an amount sufficient to redeem the aggregate principal amount of Notes required to be redeemed on such Mandatory Redemption Date, (c) by the Trustee at the written direction of the Company and upon receipt by the Trustee of an Officer's Certificate specifying the amount of funds to be withdrawn and that such funds will be applied to meet tax obligations of the Company and the Hong Kong Holding Companies and (d) by the Trustee at the written direction of the Company and upon receipt by the Trustee of an Officer's Certificate specifying the amount of funds to be withdrawn and that such funds will be applied in accordance with Section 1011.

SECTION 1307. *Note Redemption Account.*

The Trustee will establish the Note Redemption Account on or before the Issue Date. Funds in the Note Redemption Account will be applied on each Interest Payment Date commencing May 1, 2001 (each, a "Mandatory Redemption Date") to redeem on each Mandatory Redemption Date selected Notes held by Holders. The Company will instruct the Trustee to transfer into the Note Redemption Account from the Joint Venture Distribution Account sufficient funds to redeem selected Notes in accordance with the terms of the Notes.

SECTION 1308. *Letter of Credit Procurement and Deposit Agreement.*

(a) Concurrently with the delivery to the Trustee of the LOC, the Company shall deliver to the Trustee an Officer's Certificate stating that such LOC satisfies the requirements of, and is in compliance with, the provisions of the LOC and Deposit Agreement as in effect on the date hereof.

(b) The Trustee shall draw on the LOC under the following circumstances:

(A) at any time prior to the Deposit having been made pursuant to Section 2 of the LOC and Deposit Agreement:

(i) if there exists and is continuing an Event of Default under this Indenture, in which case the Trustee shall draw the

full amount available under the LOC and deposit such amount into the Construction Funding Account;

(ii) at the direction of the Company pursuant to a Company Order specifying the amount to be drawn on the LOC and certifying that such amount is to be applied to meet additional costs incurred in connection with the completion of the Toll Roads Under Development, in which case the Trustee shall draw the specified amount and deposit such amount into the Construction Funding Account pending application pursuant to the terms of this Indenture; or

(iii) at the direction of the Company pursuant to a Company Order instructing the Trustee to draw a specified amount under the LOC in satisfaction of all or a portion of Traffic Stream (China)'s or the Holding Company's obligation to make the Deposit pursuant to Section 2 of the LOC and Deposit Agreement, in which case the Trustee shall draw the specified amount and deposit such amount into the Construction Funding Account; and

(B) if there has not been deposited into the Construction Funding Account by May 6, 1999

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the Deposit pursuant to Section 2 of the LOC and Deposit Agreement, the Trustee shall, without instruction, draw on the LOC such amount which, when added to any amounts (if any) deposited into the Construction Funding Account pursuant to Section 2 of the LOC and Deposit Agreement, would equal US$8,058,750, which amount the Trustee shall deposit into the Construction Funding Account.

* * *

This Indenture may be signed in any number of counterparts each of which so executed shall be deemed to be an original, but all such counterparts shall together constitute but one and the same Indenture.

IN WITNESS WHEREOF, the parties hereto have caused this Indenture to be duly executed, and their respective corporate seals to be hereunto affixed and attested, all as of the day and year first above written.

TRAFFIC STREAM (BVI)
INFRASTRUCTURE LIMITED

By: s/ [illegible]
Name:
Title:

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THE CHASE MANHATTAN BANK

By: s/ [illegible]
Name:
Title:

CHASE MANHATTAN BANK
LUXEMBOURG S.A.

By: s/ [illegible]
Name:
Title:

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EXHIBIT A

[FACE OF NOTE]

GLOBAL REGISTERED NOTE
representing a principal amount of up to US$●

FORM OF LEGEND FOR GLOBAL NOTES

UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY TO THE COMPANY OR ITS AGENT FOR REGISTRATION OF TRANSFER, EXCHANGE OR PAYMENT, AND ANY CERTIFICATE ISSUED IN EXCHANGE HEREFOR IS REGISTERED IN THE NAME OF CEDE & CO. OR IN SUCH OTHER NAME AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY (AND ANY PAYMENT HEREON IS MADE TO CEDE & CO. OR SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY), ANY TRANSFER, PLEDGE OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL SINCE THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.

TRANSFERS OF THIS GLOBAL NOTE SHALL BE LIMITED TO TRANSFERS IN WHOLE, BUT NOT IN PART, TO NOMINEES OF THE DEPOSITORY TRUST COMPANY OR TO THE DEPOSITORY TRUST COMPANY, OR TO A SUCCESSOR THEREOF OR SUCH

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SUCCESSOR'S NOMINEE AND TRANSFERS OF PORTIONS OF THIS GLOBAL NOTE SHALL BE LIMITED TO TRANSFERS MADE IN ACCORDANCE WITH THE RESTRICTIONS SET FORTH IN ARTICLE TWO OF THE INDENTURE.

FORM OF LEGEND FOR RULE 144A GLOBAL NOTE

THIS NOTE HAS NOT BEEN REGISTERED UNDER THE UNITED STATES SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT") OR THE SECURITIES LAWS OF ANY STATE AND ACCORDINGLY, MAY NOT BE OFFERED OR SOLD WITHIN THE UNITED STATES OR TO, OR FOR THE ACCOUNT OR BENEFIT OF, U.S. PERSONS EXCEPT AS SET FORTH IN THE FOLLOWING SENTENCE. THE HOLDER HEREOF, BY ACCEPTANCE OF THIS NOTE, AGREES FOR THE BENEFIT OF TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED (THE "COMPANY") THAT THIS NOTE MAY BE OFFERED, RESOLD, PLEDGED OR OTHERWISE TRANSFERRED ONLY: (1) TO THE COMPANY OR ANY AFFILIATE THEREOF, (2) TO A PERSON WHOM THE SELLER REASONABLY BELIEVES IS A QUALIFIED INSTITUTIONAL BUYER, AS DEFINED IN RULE 144A UNDER THE SECURITIES ACT ("RULE 144A"), THAT IS PURCHASING FOR ITS OWN ACCOUNT OR FOR THE ACCOUNT OF A QUALIFIED INSTITUTIONAL BUYER TO WHOM NOTICE IS GIVEN THAT THE TRANSFER IS BEING MADE IN RELIANCE ON RULE 144A AS INDICATED BY THE BOX CHECKED BY THE TRANSFEROR ON THE REVERSE OF THIS NOTE, (3) IN AN OFFSHORE

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TRANSACTION IN ACCORDANCE WITH REGULATION S UNDER THE SECURITIES ACT, (4) PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE SECURITIES ACT (IF AVAILABLE) OR (5) PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT, IN EACH CASE IN ACCORDANCE WITH ANY APPLICABLE SECURITIES LAWS OF ANY STATE OF THE UNITED STATES OR ANY OTHER JURISDICTION SUBJECT TO THE COMPANY'S RIGHT PRIOR TO ANY OFFER, RESALE OR TRANSFER PURSUANT TO CLAUSE (4) ABOVE TO REQUIRE A DELIVERY OF OPINION OF COUNSEL, CERTIFICATION AND/OR OTHER INFORMATION SATISFACTORY TO THE COMPANY, AND IN EACH OF THE FOREGOING CASES, TO REQUIRE THAT A CERTIFICATE OF TRANSFER IN THE FORM APPEARING ON THE OTHER SIDE OF THIS NOTE BE COMPLETED AND DELIVERED BY THE TRANSFEROR TO THE TRUSTEE. THIS LEGEND MAY BE REMOVED AFTER THE EXPIRATION OF TWO YEARS FROM THE LATER OF (i) THE DATE OF ORIGINAL ISSUANCE OF THE NOTE EVIDENCED HEREBY, OR (ii) THE LAST DAY ON WHICH THE COMPANY OR ANY AFFILIATE OF THE COMPANY WAS THE OWNER OF THE NOTE EVIDENCED HEREBY (OR OF ANY PREDECESSOR OF SUCH NOTE).]

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TRAFFIC STREAM
(BVI) INFRASTRUCTURE LIMITED

14¼% Senior Secured Notes due 2006

CUSIP No. _____

No. _____ $ _____

Issue Date: May 6, 1998

This Global Registered Note represents up to an aggregate principal amount of US$119,000,000 of the 14¼% Senior Secured Notes due 2006 (the "Notes") issued by Traffic Stream (BVI) Infrastructure Limited, a corporation duly organized on August 8, 1997 and existing for an unlimited duration under the laws of the British Virgin Islands (herein called the "Company", which term includes any successor Person under the Indenture hereinafter referred to), pursuant to the Indenture hereinafter referred to.

The Company, for value received, hereby promises to pay to _____ or its registered assigns, upon surrender hereof, the outstanding principal sum of the Notes represented hereby on May 1, 2006.

Interest Rate: 14¼%

Interest Payment Dates: May 1 and November 1, commencing November 1, 1998

Regular Record Dates: April 15 and October 15

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Reference is hereby made to the further provisions of this Note set forth on the reverse hereof, which further provisions shall for all purposes have the same effect as if set forth at this place.

Unless the certificate of authentication hereon has been duly executed by the Trustee or the Authenticating Agent referred to on the reverse hereof by manual signature, this Note shall not be entitled to any benefit under the Indenture, or be valid or obligatory for any purpose.

IN WITNESS WHEREOF, the Company has caused this instrument to be duly executed manually or by facsimile by its duly authorized officers.

Dated: May 6, 1998

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED

By: _____
Name:
Title:

TRUSTEE'S CERTIFICATE OF AUTHENTICATION

Dated: May 6, 1998

This is one of the 14¼% Senior Secured Notes due 2006 referred to in the within-mentioned Indenture.

THE CHASE MANHATTAN BANK,
as Trustee

By: _____
Authorized Officer

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(Form of Reverse of Note)

14¼% Senior Secured Notes due 2006

1. *Principal and Interest.*

The Company will pay the outstanding principal of this Note on May 1, 2006.

The Company promises to pay interest on the principal amount of this Note on each Interest Payment Date, as set forth below, at the rate of 14¼% per annum (subject to adjustment as provided under "Special Interest" below). In addition, under certain circumstances, the interest rate borne by this Note may be increased by 2.00 per cent per annum as described under "Penalty Interest" below.

Interest will be payable semiannually (to the holders of record of the Notes (or any predecessor Notes) at the close of business on each April 15 or October 15 immediately preceding the Interest Payment Date) on each Interest Payment Date, commencing November 1, 1998.

Special Interest. The Holder of this Note is entitled to the benefits of the Registration Rights Agreement, dated May 6, 1998, between the Company and Merrill Lynch, Pierce, Fenner & Smith Incorporated, (the "Registration Rights Agreement"). Capitalized terms used in this paragraph and not defined elsewhere in this Note have the meanings ascribed thereto in the Registration Rights Agreement. In the event that (i) the Exchange Offer Registration Statement (or, if applicable, a Shelf Registration Statement) is not filed with

the SEC on or prior to the 120th day following the date of the Indenture, (ii) the Exchange Offer Registration Statement (or, if applicable, a Shelf Registration Statement) with respect to the Registrable Notes is not declared effective on or prior to the 150th day following the date of the Indenture, (iii) the Exchange Offer is not consummated on or prior to the 30th day following the date of effectiveness of the Exchange Offer Registration Statement, or (iv) the Exchange Offer Registration Statement or Shelf Registration Statement is filed with the SEC and declared effective but shall thereafter cease to be effective (except as specifically permitted in the Registration Rights Agreement) without being succeeded immediately by an additional Registration Statement filed with the SEC and declared effective, the interest rate borne by this Notes shall be increased by 0.50 percent per annum following such 120-day period in the case of clause (i) above, following such 150-day period in the case of clause (ii) above, following such 30-day period in the case of clause (iii) above and, except as specifically permitted herein, if a Registration Statement is not filed with the SEC and declared effective immediately following an event described in (iv) above, which rate will be increased by an additional 0.25 percent per annum for each consecutive 90-day period that any such additional interest continues to accrue, *provided* that the aggregate increase in such annual interest rate will in no event exceed 1.00 percent. Upon (w) the filing of the Exchange Offer Registration Statement or Shelf Registration Statement after the 120-day period described in clause (i) above, (x) the effectiveness of the Exchange Offer Registration Statement or Shelf Registration Statement after the 150-day period described in clause (ii) above, (y) the day before consummation of the Exchange

Offer after the 30-day period described in clause (iii) above or (z) a Registration Statement is filed with the SEC and declared effective following an event described in paragraph (iv) above, the interest rate borne by the Notes from the date of such filing, effectiveness or the day before the date of consummation, as the case may be, will be reduced to the original interest rate if the Company is otherwise in compliance with this paragraph; *provided, however,* that, if after any such reduction in interest rate, a different event specified in clauses (i), (ii), (iii) or (iv) above occurs, the interest rate will again be increased and thereafter reduced pursuant to the foregoing provisions. If the Company issues a notice that the Shelf Registration Statement is unusable pending the announcement of a material corporate transaction or otherwise pursuant to Section 3(k) of the Registration Rights Agreement, or such a notice is required under applicable securities laws to be issued by the Company, and the aggregate number of days in any consecutive 12-month period for which all such notices are issued or required to be issued exceeds 30 days in the aggregate, then the interest rate borne by the Notes will be increased by 0.50 of one percent per annum following the date that such Shelf Registration Statement ceases to be usable beyond the period permitted above, which rate shall be increased by an additional 0.25 percent per annum for each subsequent 90 day period that such additional interest continues to accrue; *provided* that the aggregate increase in such annual interest rate may in no event exceed 1.00 percent, and *provided* further that, notwithstanding anything to the contrary contained herein, if such Shelf Registration Statement is unusable for less than 30 days in the aggregate in any consecutive twelve-month period, the interest rate

borne by the Notes will not be increased pursuant to this sentence. Upon the Company declaring that the Shelf Registration Statement is usable after the interest rate has been increased pursuant to the preceding sentence, the interest rate borne by the Notes will be reduced to the original interest rate if the Company is otherwise in compliance with this paragraph; *provided, however,* that if after any such reduction in interest rate the Shelf Registration Statement again ceases to be usable beyond the period permitted above, the interest rate will again be increased and thereafter reduced pursuant to the foregoing provisions. Such additional interest on the Notes pursuant to this paragraph being "Special Interest".

Penalty Interest. If on any Determination Date after the first anniversary of the Issue Date the Debt Service Coverage Ratio is less than 1.75 to 1 and the Holding Company or Traffic Stream (China), as the case may be, has not, within 30 days afer the Calculation Date with respect to such determination Date, made a Capital Contribution in such an amount as would cause the Debt Service Coverage Ratio to be at least 1.75 to 1 on such Determination Date, then interest will accrue (in addition to the interest rate then borne by the Notes) at the rate of 2.00 per cent per annum on the then outstanding principal amount of the Notes, for a period from such Determination Date until a Capital Contribution is made which, if such capital contribution were included in the Company's Cash Flow for the period over which the Company's Debt Service Coverage Ratio is calculated on such Determination Date, would cause the Debt Service Coverage Ratio to equal or exceed 1.75 to 1 on such Determination Date (such additional interest, the "Penalty Interest"). The accrual of Penalty Interest shall be without prejudice to any other rights and remedies under the Indenture.

Additional Amounts. All payments of principal of, premium, if any, and interest (including Additional Interest, if any) on this Note will be made free and clear of, and without withholding or deduction for, any taxes, duties, assessments or governmental charges of whatever nature imposed, levied, collected, withheld or assessed by or within the British Virgin Islands, the PRC or Hong Kong or any authority therein or thereof having power to tax, unless such withholding or deduction is required by law or by regulation or governmental policy having the force of law. In the event that any such withholding or deduction in respect of principal, premium or interest is so required, the Company shall pay such additional amounts ("Additional Amounts") as will result in receipt by each holder of any Note of such amounts as would have been received by such holder or the beneficial owner with respect to such Note had no such withholding or deduction been required, except that no Additional Amounts shall be payable:

(a) for or on account of:

(1) any tax, duty, assessment or other governmental charge that would not have been imposed but for

(A) the existence of any present or former connection between such holder or the beneficial owner of such Note and the British Virgin Islands other than merely holding such Note or receiving payments or enforcing rights in respect thereof, including, without limitation,

such holder or the beneficial owner of such Note being or having been a national, domiciliary or resident of or treated as a resident thereof or being or having been present or engaged in a trade or business therein or having or having had a permanent establishment therein; or

(B) the presentation of such Note (where presentation is required) more than 30 days after the date on which the payment in respect of such Note became due and payable or provided for, whichever is later, except to the extent that such holder would have been entitled to such Additional Amounts if it had presented such Note for payment on any day within such period of 30 days;

(2) any estate, inheritance, gift, sale, transfer, personal property or similar tax, assessment or other governmental charge;

(3) any tax, assessment or other governmental charge that is imposed or withheld by reason of the failure of such holder or the beneficial owner of such Note to comply with a request by the Company addressed to such holder (A) to provide information concerning the nationality, residence or identity of such holder or such beneficial owner or (B) to make any declaration or other similar

claim or satisfy any information or reporting requirement, which, in the case of (A) or (B), is required or imposed by a statute, treaty, regulation or administrative practice of the taxing jurisdiction as a precondition to exemption from all or part of such tax, assessment or other governmental charge; or

(4) any combination of items (1), (2) and (3); or

(b) with respect to any payment of the principal of, premium, if any, or interest on such Note to such holder (including a fiduciary or partnership) to the extent that the beneficial owner of such Note would not have been entitled to such Additional Amounts had it been the holder of the Note.

Other. Whenever there is mentioned, in any context, the payment of principal, premium or interest in respect of any Note or the net proceeds received on the sale or exchange of any Note, such mention shall be deemed to include the payment of Additional Amounts provided for in the Indenture to the extent that, in such context, Additional Amounts are, were or would be payable in respect thereof pursuant to the Indenture.

Interest on this Note will accrue from the most recent date to which interest has been paid or, if no interest has been paid, from May 6, 1998; *provided* that, if there is no existing default in the payment of interest and if this Note is authenticated between a Regular Record Date referred to on the face hereof and the next succeeding Interest Payment Date, interest shall

accrue from such Interest Payment Date. Interest will be computed on the basis of a 360-day year comprised of twelve 30-day months.

The Company shall pay interest on overdue principal and premium, if any, and interest on overdue installments of interest, to the extent lawful, at a rate per annum equal to the rate of interest applicable to the Notes.

2. *Method of Payment.*

The Company will pay interest (except defaulted interest) on the principal amount of the Notes on each May 1 and November 1 to the persons who are Holders (as reflected in the Note Register at the close of business on the April 15 and October 15 immediately preceding such Interest Payment Date), in each case, even if the Note is cancelled on registration of transfer or registration of exchange after such record date; *provided* that, with respect to the final payment of principal, the Company will make payment to the Holder that surrenders this Note to any Paying Agent on or after May 1, 2006.

The Company will pay principal, premium, if any, and interest in money of the United States that at the time of payment is legal tender for payment of public and private debts. However, except in the case of Notes in global form, the Company may pay principal, premium, if any, and interest by its check payable in such money. The Company may mail an interest check to a Holder's registered address (as reflected in the Note Register). If a payment date is a date other than a Business Day at a place of payment, payment may be made

at that place on the next succeeding day that is a Business Day and no interest shall accrue for the intervening period.

3. *Paying Agent and Note Registrar.*

Initially, the Trustee will act as Transfer Agent, Paying Agent and Note Registrar. The Company has also appointed Chase Manhattan Bank Luxembourg S.A. as Paying Agent in Luxembourg. The Company may change any Paying Agent, Transfer Agent or Note Registrar upon written notice thereto. The Company, any Subsidiary or any Affiliate of any of them may act as Paying Agent, Note Registrar or co-registrar.

4. *Indenture; Limitations.*

The Company issued the Notes under an Indenture dated as of May 6, 1998 (the "Indenture"), among the Company and The Chase Manhattan Bank, as trustee (the "Trustee") and Chase Manhattan Bank Luxembourg S.A. as Paying Agent in Luxembourg. Capitalized terms herein are used as defined in the Indenture unless otherwise indicated. The terms of the Notes include those stated in the Indenture and those made part of the Indenture by reference to the Trust Indenture Act. The Notes are subject to all such terms, and Holders are referred to the Indenture and the Trust Indenture Act for a statement of all such terms. To the extent permitted by applicable law, in the event of any inconsistency between the terms of this Note and the terms of the Indenture, the terms of the Indenture shall control.

The Notes are general obligations of the Company. The Indenture limits the aggregate principal amount of the Notes to US$119,000,000.

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5. *Redemption.*

Optional Tax Redemption. If as a result of any change in or amendment to the laws, treaties, regulations or rulings of the British Virgin Islands, the PRC or Hong Kong (or of any political subdivision or taxing authority thereof or therein), or any change in official position regarding the application or interpretation of such laws, treaties, regulations or rulings (including a holding, judgment or order by a court of competent jurisdiction), which is proposed or becomes effective on or after the Issue Date or which, in the case of any change in any such official position, shall have become available to the public on or after the Issue Date, in making any payment due or to become due under the Notes or the Indenture, the Company is or would be required on or prior to the next succeeding Interest Payment Date to pay Additional Amounts, the Notes may be redeemed at the option of the Company, in whole but not in part, upon not less than 30 nor more than 60 days' notice given as provided in the Indenture, at any time, at a redemption price equal to the principal amount thereof, plus accrued and unpaid interest to the date fixed for redemption; *provided* that no such notice of redemption shall be given earlier than 90 days prior to the earliest date on which the Company would be obligated to make such withholding if a payment in respect of the Notes were then due. The Company will also pay to holders of the Notes on the redemption date any Additional Amounts which are payable.

Prior to the giving of any notice of redemption in accordance with the foregoing, the Company shall deliver to the Trustee an Officer's Certificate stating that the Company

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is entitled to effect such redemption based on an Opinion of Counsel or written advice of a qualified tax expert that the Company has or will become obligated to pay Additional Amounts as a result of such change or amendment. Such notice, once delivered by the Company or to the Trustee, will be irrevocable.

Optional Redemption. Except as set forth under "Optional Tax Redemption" above, the Notes will not be redeemable at the option of the Company prior to May 1, 2003. On or after such date, the Notes will be redeemable in whole, but not in part, upon not more than 60 nor less than 30 days' notice to the Noteholders and not less than 45 days' notice to the Trustee, at any time at the option of the Company, at the redemption prices (expressed as percentages of principal amount) set forth below, plus accrued and unpaid interest (including Additional Interest, if any), and any Additional Amounts due thereon, to the date of redemption, if redeemed during the 12 month period beginning May 1 of the years indicated below:

During Year	**Percentage**
2003	108.000%
2004	105.000%
2005	102.000%
2006	100.000%

All Notes redeemed shall be cancelled.

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Mandatory Redemption. The Notes will be redeemed on each Mandatory Redemption Date in the amounts and at the redemption prices (expressed as percentages of principal amount) set out below. The aggregate principal amount of Notes to be so redeemed shall be an amount equal to the product of (i) the percentage set out under the heading "Percentage of Principal Amount" below multiplied by (ii) (A) the original aggregate principal amount of Notes issued on the Issue Date minus (B) the aggregate principal amount of Notes which have been cancelled on or prior to the 45th day preceding such Mandatory Redemption Date.

Mandatory Redemption Date	**Percentage of Principal Amount**	**Redemption Price**
May 1, 2001	5.88%	108.000%
November 1, 2001	5.88	108.000
May 1, 2002	6.72	108.000
November 1, 2002	6.72	108.000
May 1, 2003	7.56	108.000
November 1, 2003	7.56	108.000
May 1, 2004	7.56	108.000
November 1, 2004	7.56	108.000
May 1, 2005	8.40	108.000
November 1, 2005	9.66	100.000
May 1, 2006	*	100.000

* remaining principal amount of Notes outstanding to be redeemed

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6. *Repurchase Upon a Change of Control.*

Upon the occurrence of a Change of Control, the Company will be required to make an offer to purchase on the Change of Control Payment Date all Outstanding Notes at a purchase price in cash equal to 101% of the aggregate principal amount thereof, plus accrued and unpaid interest thereon, if any, to the date of purchase in accordance with the Indenture.

7. *Denominations Transfer; Exchange.*

Notes are in registered form without coupons, in denominations of $1,000 and any integral multiple thereof. A Holder may register the transfer or exchange of Notes in accordance with the Indenture. The Note Registrar may require a Holder, among other things, to furnish appropriate endorsements and transfer documents and to pay any taxes and fees required by law or permitted by the Indenture.

8. *Discharge Prior to Redemption or Maturity.*

The Indenture contains provisions for defeasance at any time of (a) the entire indebtedness of the Company on this Note and (b) certain restrictive covenants and the related Defaults and Events of Default, upon compliance by the Company with certain conditions set forth therein, which provisions apply to this Note.

9. *Amendment; Supplement; Waiver.*

The Indenture permits, with certain exceptions as therein provided, the amendment thereof and the modification of

the rights and obligations of the Company and the rights of the Holders under the Indenture and the Notes, at any time by the Company and the Trustee with the consent of the Holders of a specified percentage in aggregate principal amount of the Notes at the time Outstanding. The Indenture also contains provisions permitting the Holders of specified percentages in aggregate principal amount of the Notes at the time Outstanding, on behalf of the Holders of all the Notes, to waive compliance by the Company with certain provisions of the Indenture and the Notes and certain past defaults under the Indenture and the Notes, and their consequences. Any such consent or waiver by or on behalf of the Holder of this Note shall be conclusive and binding upon such Holder and upon all future Holders of this Note and of any Note issued upon the registration of transfer hereof or in exchange herefor or in lieu hereof whether or not notation of such consent or waiver is made upon this Note.

10. *Restrictive Covenants.*

The Indenture contains certain covenants, including, without limitation, covenants with respect to the following matters: (i) Limitation on Indebtedness; (ii) Limitation on Restricted Payments; (iii) Limitation on Distribution from Restricted Subsidiaries; (iv) Limitation on Transactions with Affiliates; (v) Limitation on Liens; (vi) Limitation on Sales of Assets; (vii) Limitation on Nature of Business of the Company, the Hong Kong Holding Companies and the Toll Road Joint Ventures; (viii) Maintenance of Insurance; (ix) Limitation on Ownership of Interests in Toll Road Joint Ventures; (x) Maintenance of Ownership in subsidiaries and Joint Ventures; (xi) Maintenance of Ownership in Company;

(xii) Operation and Maintenance; Engineering Reports; Audit of Toll Collection System; (xiii) Government Approvals; Compliance with Laws; (xiv) Change of Control; (xv) Taxes; (xvi) Annual and Interim Reports; (xvii) merger and certain transfers of assets; (xviii) Maintenance of Debt Service Coverage Ratio; (xix) Disposition of Non-Project Toll Road Joint Ventures and (xx) Installation and Certification of Computerized Ticketing Systems; Relocation of Toll Booth. The Company must furnish to the Trustee annual and semiannual statements as to the compliance by the Company with such limitations.

11. *Successor Persons.*

When a successor person or other entity assumes all the obligations of its predecessor under the Notes and the Indenture, the predecessor person will be released from those obligations.

12. *Remedies for Events of Default.*

If an Event of Default, as defined in the Indenture, occurs and is continuing, the Trustee or the Holders of not less than 25% in principal amount of the Notes then Outstanding may declare all the Notes to be immediately due and payable. If a bankruptcy or insolvency default with respect to the Company or any of its Subsidiaries occurs and is continuing, the Notes automatically become immediately due and payable. Holders may not enforce the Indenture or the Notes except as provided in the Indenture. The Trustee may require indemnity satisfactory to it before it enforces the Indenture or the Notes. Subject to certain limitations, Holders of at least a majority

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in principal amount of the Notes then Outstanding may direct the Trustee in its exercise of any trust or power.

THIS NOTE AND THE INDENTURE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK.

All terms used in this Note which are defined in the Indenture shall have the meanings assigned to them in the Indenture.

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EXHIBIT B

FORM OF TRANSFER CERTIFICATE FOR TRANSFER FROM RULE 144A GLOBAL NOTE TO REGULATION S GLOBAL NOTE (TRANSFERS PURSUANT TO SECTION 3 OF THE INDENTURE)

The Chase Manhattan Bank
as Trustee
Global Trust Services
450 West 33rd Street
Fifteenth Floor
New York, New York 10001-2697

Re: *Traffic Stream (BVI) Infrastructure Limited (the "Company") 14¼% Senior Secured Notes due 2006*

Ladies and Gentlemen:

Reference is hereby made to the Indenture dated as of May 6, 1998 (the "Indenture) between Traffic Stream (BVI) Infrastructure Limited (the "Company"), as Issuer and The Chase Manhattan Bank, as Trustee. Capitalized terms used but not defined herein shall have the meanings given to them in the Indenture.

This letter relates to US$[ ] aggregate principal amount of Notes which are evidenced by a Rule 144A Global Note (CUSIP No._____) and held with the Depositary in the name of [insert name of transferor] (the "Transferor"). The Transferor has requested a transfer of such beneficial

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interest in the Rule 144A Global Note to a person who will take delivery thereof in the form of an equal aggregate principal amount of Notes evidenced by a Regulation S Global Note of the same series and of like tenor as the Notes (CUSIP No._____).

In connection with such request and in respect of such Notes, the Transferor does hereby certify that such transfer has been effected pursuant to and in accordance with Rule 903 or Rule 904 under the United States Securities Act of 1933, as amended (the "Securities Act"), and accordingly the Transferor does hereby further certify that:

(1) the offer of the Notes was not made to a person in the United States;

(2) either (a) at the time the buy order was originated, the transferee was outside the United States or the Transferor and any person acting on its behalf reasonably believed that the transferee was outside the United States or (b) the transaction was executed in, on or through the facilities of a Designated Offshore Securities Market and neither the Transferor nor any person acting on its behalf knows that the transaction was prearranged with a buyer in the United States;

(3) no directed selling efforts have been made in contravention of the requirements of Rule 903(b) or Rule 904(b) of Regulation S, as applicable; and

(4) the transaction is not part of a plan or scheme to evade the registration requirements of the Securities Act.

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This certificate and the statements contained herein are made for your benefit and the benefit of the Company and the Initial Purchaser. Terms used in this certificate and not otherwise defined herein or in the Indenture have the meanings set forth in Regulation S under the Securities Act.

[Insert Name of Transferor]

By: _____
Name:
Title:

Dated: _____

cc: Traffic Stream (BVI) Infrastructure Limited

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EXHIBIT C

FORM OF TRANSFER CERTIFICATE FOR TRANSFER FROM REGULATION GLOBAL NOTE TO RULE 144A GLOBAL NOTE (TRANSFERS PURSUANT TO SECTION ● OF THE INDENTURE)

_____, __

The Chase Manhattan Bank
as Trustee
Global Trust Services
450 West 33rd Street
Fifteenth Floor
New York, New York 10001-2697

Re: *Traffic Stream (BVI) Infrastructure Limited (the "Company") 14¼% Senior Secured Notes due 2006 (the "Notes")*

Ladies and Gentlemen:

Reference is hereby made to the Indenture, dated as of May 6, 1998 (the "Indenture) between Traffic Stream (BVI) Infrastructure Limited (the "Company"), as Issuer and The Chase Manhattan Bank, as Trustee. Capitalized terms used but not defined herein shall have the meanings given to them in the Indenture.

This letter relates to US$[ ] aggregate principal amount of Notes which are evidenced by a Regulation S

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Global Note (CUSIP No._____) and held with the U.S. Depositary through Euroclear or Cedel or both (Common Code [ ]) in the name of [insert name of transferor] (the "Transferor"). The Transferor has requested a transfer of such beneficial interest in the Regulation S Global Note to a person who will take delivery thereof in the form of an equal aggregate principal amount of Notes evidenced by a Rule 144A Global Note of the same series and of like tenor as the Notes (CUSIP No._____). The Transferor has informed such person that he is obtaining an interest in a Note that is subject to restrictions on transfer and that each subsequent transferee should be so informed.

In connection with such request and in respect of such Notes, the Transferor does hereby certify that such transfer has been effected pursuant to and in accordance with Rule 144A under the United States Securities Act of 1933, as amended (the "Securities Act"), and accordingly the Transferor does hereby further certify that the Notes are being transferred to a person that the Transferor reasonably believes is purchasing the Notes for its own account, or for one or more accounts with respect to which such person exercises sole investment discretion, and such person and each such account is a "qualified institutional buyer" within the meaning of Rule 144A under the Securities Act, in each case in a transaction meeting the requirements of Rule 144A and in accordance with any applicable securities laws of any state of the United States.

The Transferor further certifies that it is not an "affiliate" of the Company within the meaning of the Securities Act.

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This certificate and the statements contained herein are made for your benefit and the benefit of the Company and the Initial Purchaser.

[Insert Name of Transferor]

By: _____
Name:
Title:

Dated: _____

cc: Traffic Stream (BVI) Infrastructure Limited

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EXHIBIT D

FORM OF SUBORDINATION AGREEMENT

(i) so long as an Event of Default under the Notes has occurred and is continuing, the subordinated creditors will not ask, demand, sue for, take or receive from the Company, directly or indirectly, in cash or other property or by set-off, purchase, acquisition or redemption or in any other manner, payment for any of the obligations under the Subordinated Indebtedness until all obligations of the Company under the Notes shall have been paid in full; and

(ii) at any time before all obligations under the Notes shall have been paid in full, the creditors under the Subordinated Indebtedness will not commence, or join with any other creditors in commencing, any bankruptcy, insolvency, liquidation or similar proceedings to enforce or collect on any obligations under the Subordinated Indebtedness or accelerate the maturity of all or any of the obligations under the Subordinated Indebtedness.

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EXHIBIT B TO COMPLAINT — LETTER OF CREDIT PROCUREMENT AND DEPOSIT AGREEMENT

LETTER OF CREDIT PROCUREMENT AND DEPOSIT AGREEMENT

This LETTER OF CREDIT PROCUREMENT AND DEPOSIT AGREEMENT (this "Agreement") dated May 6, 1998 made by and among Traffic Stream Infrastructure Holdings Company Limited, a corporation incorporated under the laws of Bermuda ("Holdings,"), Traffic Stream (China) Infrastructure Company Limited, a corporation incorporated under the laws of the British Virgin Islands ("Traffic Stream (China)"), Mr. Ng Hon Leung, holder of Hong Kong identity card number P 199905(6), China Nonferrous Metals Holdings (Hong Kong) Limited, a corporation incorporated under the laws of Hong Kong ("CNMH") and Traffic Stream (BVI) Infrastructure Limited, a corporation incorporated under the laws of the British Virgin Islands (the 'Issuer"). Unless otherwise defined herein, terms used herein shall have the meanings ascribed thereto in the Indenture (as defined below).

WHEREAS the Issuer has issued on the date hereof US$119,000,000 aggregate principal amount of its 14¼% Senior Secured Notes due 2006 pursuant to the terms of an indenture dated the date hereof by and between the Issuer and The Chase Manhattan Bank, as trustee (the "Indenture"); and

WHEREAS all of the issued and outstanding capital stock of the Issuer is owned by Traffic Stream (China); and

WHEREAS Holdings proposes to acquire all of the issued and outstanding capital stock of Traffic Stream (China); and

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WHEREAS Mr. Ng Hon Leung and his spouse beneficially own a majority of the issued and outstanding capital stock of the Issuer; and

WHEREAS CNMH beneficially owns approximately 20% of the issued and outstanding capital stock of the Issuer.

NOW THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

SECTION 1. *Aereement to Procure Letter of Credit.* (a) Each of Holdings, Traffic Stream (China), Mr. Ng Hon Leung and CNMH hereby undertakes and agrees, jointly and severally, to procure the issuance of a letter of credit meeting the requirements of Section 1(b) (the "Letter of Credit") and to deliver such Letter of Credit to the Trustee on or before January 6, 1999.

(b) The Letter of Credit shall:

(i) be an irrevocable standby letter of credit issued in favor of the Trustee,

(ii) be issued by a bank having an investment grade long term debt rating or an investment grade deposit rating (which ratings may be based on publicly available information) either provided by S&P (or any successor thereto) or by Moody's (or any successor thereto), *provided* that, if a bank is not rated by either S&P or Moody's (or a successor

of either of them), for purposes hereof such bank shall be deemed to have the long term debt rating or deposit rating of its parent (if rated), and *provided, further* that a bank shall be deemed not to have an investment grade rating for purposes hereof if its long term debt rating (or, if not available, that of its parent) or its deposit rating is rated non-investment grade by either S&P or Moody's (for purposes hereof investment grade rating means a rating of "BBB" or above by S&P or a rating of "Baa2" or above by Moody's),

(iii) be denominated in United States Dollars in a stated amount equal to US$8,058,750.00,

(iv) be reduced by the amount of each drawing thereunder,

(v) provide that it may be drawn on by the Trustee (A) at any time prior to the deposit having been made pursuant to Section 2 hereof (x) if there exists and is continuing an Event of Default under the Indenture, (y) at the direction of the Issuer to meet any additional costs incurred in connection with the completion of the Toll Roads Under Development, or (z) at the direction of the Issuer to make the deposit referred to in Section 2 hereof, or (B) if there has not been deposited into the Construction Funding Account by May 6, 1999 the amount required to be deposited pursuant to Section 2 hereof,

(vi) provide that it will not terminate prior to the earlier of (a) the date on which the Letter of Credit has been fully drawn and (b) the date of the deposit made pursuant to Section 2 hereof.

(c) Delivery of the Letter of Credit to the Trustee shall be accompanied by an officer's Certificate of the Issuer stating that such Letter of Credit satisfies the requirements of and is in compliance with the provisions of this Agreement.

(d) Notwithstanding the foregoing, the obligation of Holdings, Traffic Stream (China), Mr. Ng Hon Leung and CNMH to procure and deliver the Letter of Credit shall terminate at such time as Holdings, Traffic Stream (China) or Mr. Ng Hon Leung has deposited the amount required to be deposited into the Construction Funding Account pursuant to Section 2 hereof.

SECTION 2. *Deposit into Construction Funding Account.* Each of Traffic Stream (China) and Holdings hereby undertakes and agrees, jointly and severally, to deposit into the Construction Funding Account, in United States Dollars, an aggregate amount of US$8,058,750.00 on or before May 6, 1999, which amount shall be reduced by any amount drawn under the Letter of Credit pursuant to Section 1(b)(v)(A)(y) or (z) hereof.

SECTION 3. *Personal Guarantee.* Mr. Ng Hon Leung hereby personally, unconditionally and irrevocably guarantees the prompt deposit into the Construction Funding Account of all amounts to be so deposited by Traffic Stream (China) and Holdings under Section 2 of this Agreement.

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SECTION 4. *Representations and Warranties of Holdings.* In connection with the agreement contained herein, Holdings hereby represents and warrants as follows:

(i) Holdings has been duly organized and incorporated as a company with limited liability and is validly existing under the laws of Bermuda and has corporate power and authority to own, lease and operate its properties and to conduct its business as currently conducted and to enter into and perform its obligations under this Agreement. Holdings is duly qualified as a foreign corporation to transact business and is in good standing in each other jurisdiction in which such qualification is required, whether by reason of the ownership or leasing of property or the conduct of business, except where the failure so to qualify or to be in good standing would not have a material adverse effect on the condition, financial or otherwise, or on the earnings, shareholders' equity, business affairs, operations or business prospects of Holdings.

(ii) *Authorization of this Agreement.* This Agreement has been duly authorized, executed and delivered by Holdings and constitutes a valid and binding obligation of Holdings, enforceable against Holdings in accordance with its terms, except as enforcement thereof may be limited by bankruptcy, insolvency (including, without limitation, all laws relating to fraudulent transfers), reorganization, moratorium or similar

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laws now or hereafter in effect relating to or affecting enforcement of creditors' rights generally and except as enforcement thereof is subject to general principles of equity (regardless of whether enforcement is considered in a proceeding in equity or at law).

(iii) *Absence of Defaults and Conflicts.* Holdings is not in violation of its charter, by-laws or other organizational documents or in default in the performance or observance of any obligation, agreement, covenant or condition contained in any contract, indenture, Mortgage, deed of trust, loan or credit agreement, note, lease or other agreement or instrument to which Holdings is a parry or by which Holdings may be bound, or to which any of the property or assets of Holdings is subject (collectively, as used in this paragraph, "Agreements and Instruments") except for such defaults that would not have a material adverse effect on the condition, financial or otherwise, or on the earnings, shareholders' equity, business affairs, operations or business prospects of Holdings; and the execution, delivery and performance of this Agreement and the consummation of the transactions contemplated herein and the compliance by Holdings with its obligations hereunder have been duly authorized by all necessary corporate action and do not and will not, whether with or without the giving of notice or passage of time or both, conflict with or constitute a breach of, or default or a Repayment

Event (as defined below) under, or result in the creation or imposition of any lien, charge or encumbrance upon any property or assets of Holdings or any of its subsidiaries pursuant to, the Agreements and Instruments except for such conflicts, breaches or defaults or liens, charges, encumbrances or violations that, singly or in the aggregate, would not have a material adverse effect on Holdings' ability to perform its obligations hereunder, nor will such action result in any violation of the provisions of the charter, by-laws or other organizational documents of Holdings or violate any applicable law, statute, rule, regulation, judgment, order, writ or decree of any government, government instrumentality or court, domestic or foreign, having jurisdiction over Holdings or any of its subsidiaries or any of their assets, properties or operations. As used herein, a "Repayment Event" means any event or condition which gives the holder of any note, debenture or other evidence of indebtedness (or any person acting on such holder's behalf) the right to require the repurchase, redemption or repayment of all or a portion of such indebtedness by the obligor thereunder or any of its subsidiaries.

SECTION 5. *Representations and Warranties of Traffic Stream (China).* In connection with the agreement contained herein, Traffic Stream (China) hereby represents and warrants as follows:

(i) Traffic Stream (China) has been duly organized and incorporated as a company with

limited liability and is validly existing under the laws of the British Virgin Islands and has corporate power and authority to own, lease and operate its properties and to conduct its business as currently conducted and to enter into and perform its obligations under this Agreement. Traffic Stream (China) is duly qualified as a foreign corporation to transact business and is in good standing in each other jurisdiction in which such qualification is required, whether by reason of the ownership or leasing of property or the conduct of business, except where the failure so to qualify or to be in good standing would not have a material adverse effect on the condition, financial or otherwise, or on the earnings, shareholders' equity, business affairs, operations or business prospects of Traffic Stream (China).

(ii) *Authorization of this Agreement.* This Agreement has been duly authorized, executed and delivered by Traffic Stream (China) and constitutes a valid and binding obligation of Traffic Stream (China), enforceable against Traffic Stream (China) in accordance with its terms, except as enforcement thereof may be limited by bankruptcy, insolvency (including, without limitation, all laws relating to fraudulent transfers), reorganization, moratorium or similar laws now or hereafter in effect relating to or affecting enforcement of creditors' rights generally and except as enforcement thereof is subject to general principles of equity (regardless of whether enforcement is considered in a proceeding in equity or at law).

(iii) *Absence of Defaults and Conflicts.* Traffic Stream (China) is not in violation of its charter, by-laws or other organizational documents or in default in the performance or observance of any obligation, agreement, covenant or condition contained in any contract, indenture, mortgage, deed of trust, loan or credit agreement, note, lease or other agreement or instrument to which Traffic Stream (China) is a party or by which Traffic Stream (China) may be bound, or to which any of the property or assets of Traffic Stream (China) is subject (collectively, as used in this paragraph, "Agreements and Instruments") except for such defaults that would not have a material adverse effect on the condition, financial or otherwise, or on the earnings, shareholders' equity, business affairs, operations or business prospects of Traffic Stream (China); and the execution, delivery and performance of this Agreement and the consummation of the transactions contemplated herein and the compliance by Traffic Stream (China) with its obligations hereunder have been duly authorized by all necessary corporate action and do not and will not, whether with or without the giving of notice or passage of time or both, conflict with or constitute a breach of, or default or a Repayment Event under, or result in the creation or imposition of any lien, charge or encumbrance upon any property or assets of Traffic Stream (China) or any of its subsidiaries pursuant to, the Agreements and Instruments except for such conflicts, breaches or defaults or

liens, charges, encumbrances or violations that, singly or in the aggregate, would not have a material adverse effect on Traffic Stream (China)'s ability to perform its obligations hereunder, nor will such action result in any violation of the provisions of the charter, by-laws or other organizational documents of Traffic Stream (China) or violate any applicable law, statute, rule, regulation, judgment, order, writ or decree of any government, government instrumentality or court, domestic or foreign, having jurisdiction over Traffic Stream (China) or any of its subsidiaries or any of their assets, properties or operations.

SECTION 6. *Representations, Warranties and Covenants of CNMH.* In connection with the agreement contained herein, CNMH hereby represents, warrants and covenants as follows:

(i) CNMH has been duly organized and incorporated as a company with limited liability and is validly existing under the laws of Hong Kong and has corporate power and authority to own, lease and operate its properties and to conduct its business as currently conducted and to enter into and perform its obligations under this Agreement. CNMH is duly qualified as a foreign corporation to transact business and is in good standing in each other jurisdiction in which such qualification is required, whether by reason of the ownership or leasing of property or the conduct of business, except where the failure so to qualify or to be in good standing would not

have a material adverse effect on the condition, financial or otherwise, or on the earnings, shareholders' equity, business affairs, operations or business prospects of CNMH.

(ii) *Authorization of this Agreement.* This Agreement has been duly authorized, executed and delivered by CNMH and constitutes a valid and binding obligation of CNMH, enforceable against CNMH in accordance with its terms, except as enforcement thereof may be limited by bankruptcy, insolvency (including, without limitation, all laws relating to fraudulent transfers), reorganization, moratorium or similar laws now or hereafter in effect relating to or affecting enforcement of creditors' rights generally and except as enforcement thereof is subject to general principles of equity (regardless of whether enforcement is considered in a proceeding in equity or at law).

(iii) *Absence of Defaults and Conflicts.* CNMH is not in violation of its charter, by-laws or other organizational documents or in default in the performance or observance of any obligation, agreement, covenant or condition contained in any contract, indenture, mortgage, deed of trust, loan or credit agreement, note, lease or other agreement or instrument to which CNMH is a party or by which CNMH may be bound, or to which any of the property or assets of CNMH is subject (collectively, as used in this paragraph, "Agreements and Instruments") except for such defaults that would

not have a material adverse effect on the condition, financial or otherwise, or on the earnings, shareholders' equity, business affairs, operations or business prospects of CNMH; and the execution, delivery and performance of this Agreement and the consummation of the transactions contemplated herein and the compliance by CNMH with its obligations hereunder have been duly authorized by all necessary corporate action and do not and will not, whether with or without the giving of notice or passage of time or both, conflict with or constitute a breach of, or default or a Repayment Event under, or result in the creation or imposition of any lien, charge or encumbrance upon any property or assets of CNMH or any of its subsidiaries pursuant to, the Agreements and Instruments except for such conflicts, breaches or defaults or liens, charges, encumbrances or violations that, singly or in the aggregate, would not have a material adverse effect on CNMH's ability to perform its obligations hereunder, nor will such action result in any violation of the provisions of the charter, by-laws or other organizational documents of CNMH or violate any applicable law, statute, rule, regulation, judgment, order, writ or decree of any government, government instrumentality or court, domestic or foreign, having jurisdiction over CNMH or any of its subsidiaries or any of their assets, properties or operations.

(iv) As of the date hereof, no proceedings have been commenced or are contemplated for the merger

consolidation, reorganization, dissolution or liquidation of the Company, nor has there been commenced or threatened any such action or proceeding.

(v) CNMH shall not enter into a Merger unless at the time and immediately after giving effect thereto either (A) CNMH will be the surviving corporation or (B) the Person (if other than CNMH) formed by such Merger or into which CNMH or CNMH and its subsidiaries is merged or the Person that acquires as a result of such Merger all or substantially all the properties and assets of CNMH or CNMH and its subsidiaries, as the case may be, shall expressly assume CNMH's obligations hereunder.

"Merger" means a single transaction or a series of related transactions whereby CNMH consolidates with or merges with or into any other Person or sells, assigns, conveys, transfers, leases or otherwise disposes of all or substantially all of its properties and assets as an entirety to any Person or Persons or permits any subsidiary to enter into any such transaction or series of transactions if such transaction or series of transactions, in the aggregate, would result in the sale, assignment, conveyance, transfer, lease or other disposition of all or substantially all of the properties and assets of CNMH and its subsidiaries on a consolidated basis to any Person or Persons.

SECTION 7. *Amendments*. Neither this Agreement nor any of the terms hereof may be amended unless such amendment is in writing and signed by each of the parties hereto.

SECTION 8. *Notices*. (a) Any notice, agreement, consent or other communication under or in connection with this Agreement shall be in writing, delivered personally or by prepaid letter (by airmail, if to an address in another country) or facsimile transmission addressed to the relevant party at its correspondence address or facsimile number from time to time notified by a party to the others.

(b) Any notice or other communication to be given, made or served pursuant to or for any purpose of this Agreement shall be in writing and may be delivered personally or sent by letter (postage prepaid and by airmail if to another country), or facsimile transmission and shall be deemed given, made or served, if delivered personally, when left at the relevant address or, if sent by letter, two Hong Kong business days (or 7 business days if by airmail) after being put in the post or if sent by facsimile transmission, on the next working day in the place to which it is sent and in proving service of any notice it shall be sufficient to prove that the notice was properly directed or addressed and delivered or sent.

SECTION 9. *No Third Party Beneficiaries*. This Agreement is not intended to confer upon any Person (including without limitation any holder of a Note, the Trustee or the Collateral Agent) other than the parties hereto any rights or remedies hereunder or otherwise benefit any such Person.

SECTION 10. *Process Agent*. Each of Holdings, Traffic Stream (China) and the Issuer hereby irrevocably

appoints South-East Asia Investment Holding Co. Ltd. (at its registered office for the time being in Hong Kong) to be their process agent with authority to accept, on their behalf, the service of legal process issued out of the courts of the Hong Kong Special Administrative Region in any legal action arising out of or in connection with this Agreement. Each of Holdings, Traffic Stream (China) and the Issuer hereby irrevocably authorizes the Trustee, in the event of the process agent hereby appointed ceasing to be available in Hong Kong for the purpose of accepting the service of legal process, from time to time to designate for such purpose any other person in Hong Kong selected by the Trustee unless Holdings, Traffic Stream (China) or the Issuer shall have designated some other person for such purpose acceptable to the Trustee.

SECTION 11. *Submission to Hong Kong Jurisdiction.* Each of the parties hereto hereby irrevocably submits to the non-exclusive jurisdiction of the courts of the Hong Kong Special Administrative Region. Such submission to the jurisdiction of the courts of the Hong Kong Special Administrative Region shall not limit the right of any party hereto to take proceedings in the courts of any other country having, claiming or accepting jurisdiction, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in another jurisdiction.

SECTION 12. *Governing Law.* THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA.

IN WITNESS-WHEREOF, the parties have each caused this Agreement duly executed and delivered as a deed as of the date first above written.

The Common Seal of Traffic Stream)
Infrastructure Holdings Co. Ltd. was)
hereonto affixed in the presence of:)

The Common Seal of Traffic Stream)
(China) Infrastructure Co. Ltd. was)
hereonto affixed in the presence of:)

SIGNED SEALED and DELIVERED)
By Mr. Ng Hon Leung)
in the presence of:)

The Common Seal of China Nonferrous)
Metals Holdings (Hong Kong) Ltd. was)
hereonto affixed in the presence of:)

The Common Seal of Traffic Stream)
(BVI) Infrastructure Co. Ltd. was)
hereonto affixed in the presence of:)

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[Filing Receipt Omitted]

APPENDIX D — AMENDED ANSWER DATED AUGUST 6, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 4056 (SAS)

THE CHASE MANHATTAN BANK, AS INDENTURE TRUSTEE, UNDER THE INDENTURE, DATED AS OF MAY 6, 1998,

Plaintiff,

-against-

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Defendant.

AMENDED ANSWER

Defendant Traffic Stream (BVI) Infrastructure Limited, by its undersigned attorneys, answers the complaint, as follows:

1. Admits the allegations contained in paragraph 1 of the complaint.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint.

3. Admits the allegations contained in paragraph 3 of the complaint.

4. With respect to the allegations contained in paragraph 4 of the complaint, Defendant states that these allegations purport to characterize the nature of the complaint to which no response is required.

BACKGROUND

5. Admits the allegations contained in paragraph 5 of the complaint.

6. Admits the allegations contained in paragraph 6 of the complaint.

7. Admits the allegations contained in paragraph 7 of the complaint.

8. With respect to the allegations contained in paragraph 8 of the complaint, Defendant admits that it entered into the Indenture and respectfully refers to the Indenture for the full and complete provisions thereof.

9. With respect to the allegations contained in paragraph 9 of the complaint, Defendant admits that it entered into the Indenture and respectfully refers to the Indenture for the full and complete provisions thereof.

10. With respect to the allegations contained in paragraph 10 of the complaint, Defendant admits that it entered into the Indenture and respectfully refers to the Indenture for the full and complete provisions thereof.

11. With respect to the allegations contained in paragraph 11 of the complaint, Defendant admits that it entered into the Indenture and respectfully refers to the Indenture for the full and complete provisions thereof.

12. With respect to the allegations contained in paragraph 12 of the complaint, Defendant states that they purport to assert conclusions of law to which no response is required, except admits that the Trustee has possession of the Collateral.

13. With respect to the allegations contained in paragraph 13 of the complaint, Defendant admits that it entered into the Indenture and respectfully refers to the Indenture for the full and complete provisions thereof. Defendant further denies knowledge or information sufficient to from a belief as to the truth of the allegations made in the last sentence of paragraph 13.

14. Admit the allegations contained in the first two sentences of paragraph 14, and denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third sentence of paragraph 14.

15. With respect to the allegations contained in paragraph 15 of the complaint, Defendant admits that it entered into the Indenture and respectfully refers to the Indenture for the full and complete provisions thereof. Defendant further responds by denying knowledge and information sufficient to form a belief as to the truth of the allegations contained in the third sentence of paragraph 15.

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16. With respect to the allegations contained in paragraph 16 of the complaint, Defendant admits that it entered into the Indenture and respectfully refers to the Indenture for the full and complete provisions thereof. Defendants further responds by denying knowledge and information sufficient to form a belief as to the truth of the allegations contained in the third sentence of paragraph 16.

17. With respect to the allegations contained in paragraph 17 of the complaint, Defendant admits that it entered into the Indenture and respectfully refers to the Indenture for the full and complete provisions thereof.

18. With respect to the allegations contained in paragraph 18 of the complaint, Defendant admits that it entered into the Indenture and respectfully refers to the Indenture for the full and complete provisions thereof.

19. With respect to the allegations contained in paragraph 19 of the complaint, Defendant admits that it entered into the Indenture and respectfully refers to the Indenture for the full and complete provisions thereof.

20. With respect to the allegations contained in paragraph 20 of the complaint, Defendant admits that it entered into the Indenture and respectfully refers to the Indenture for the full and complete provisions thereof.

21. With respect to the allegations contained in paragraph 21 of the complaint, Defendant admits that it entered into the Indenture and respectfully refers to the Indenture for the full and complete provisions thereof.

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22. Admits the allegations contained in the first and second sentences of paragraph 22 of the complaint. With respect to the third sentence of paragraph 22, Defendant refers to the Indenture for the full and complete provisions thereof.

23. Admits the allegations contained in paragraph 23 of the complaint.

24. Admits the allegations contained in the first sentence of paragraph 24, and declines to respond to the second sentence of paragraph 24 on the grounds that it purports to assert legal conclusions to which no response is required.

25. Admits that it did not make the payments referred to in the first, second and third sentences of paragraph 25 of the complaint. With respect to the last sentence in paragraph 25, Defendant refers to the Indenture for the full and complete provisions thereof.

26. With respect to the allegations contained in paragraph 26 of the complaint, Defendant refers the court to the LOC Agreement for the full and complete provisions thereof.

27. Admits the first and second sentences of paragraph 27 of the complaint. With respect to the third sentence of paragraph 27, Defendant refers to the Indenture for the full and complete provisions thereof.

28. Declines to respond to the legal conclusions contained in paragraph 28 of the complaint, except admits that Defendant failed to deliver the LOC in full by January

6, 1999, there was an ensuing Declaration and respectfully refers to the documents referred to in paragraph 28 for the full and complete provisions thereof.

29. Admits to the allegations contained in paragraph 29 of the complaint.

30. With respect to paragraph 30 of the complaint, Defendant refers the court to the Indenture for the full and complete provisions thereof.

31. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of the complaint, except admits the first sentence of paragraph 31.

FIRST CAUSE OF ACTION

32. Defendant repeats and realleges its responses to paragraphs 1 through 31 of the complaint as though fully set forth herein.

33. Admits the allegations contained in paragraph 33 of the complaint.

34. Admits the allegations contained in paragraph 34 of the complaint, except that it was unable to deliver the Letter of Credit or to pay on the Notes.

35. With respect to the allegations contained in paragraph 35 of the complaint, Defendant refers the court to the Indenture for the full and complete provisions thereof.

36. With respect to the allegations contained in paragraph 36 of the complaint, Defendant states that no response is required.

37. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37 of the complaint.

SECOND CAUSE OF ACTION

38. Defendant repeats and realleges its responses to paragraphs 1 through 37 of the complaint as though fully set forth herein.

39. With respect to the allegations contained in paragraph 39 of the complaint, Defendant states that they assert legal conclusions to which no response is required.

THIRD CAUSE OF ACTION

40. Defendant repeats and realleges its responses to paragraphs 1 through 39 of the complaint as though fully set forth herein.

41. Admits the allegations contained in paragraph 41 of the complaint.

42. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 42.

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43. With respect to the allegations contained in paragraph 43 of the complaint, Defendant refers the court to the Indenture for the full and complete provisions thereof.

44. With respect to paragraph 44 of the complaint, Defendant states that no response is required.

FOURTH CAUSE OF ACTION

45. Defendant repeats and realleges its responses to paragraphs 1 through 44 of the complaint as though fully set forth herein.

46. With respect to the allegations contained in paragraph 46 of the complaint, Defendant states that they assert legal conclusions to which no response is required.

47. Admits the allegations contained in the second and third sentences of paragraph 47 of the complaint, and declines to respond to the remaining allegations contained in paragraph 47 on the ground that they state legal conclusions to which no response is required.

48. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 48 of the complaint.

49. With respect to the allegations contained in paragraph 49 of the complaint, Defendant states that they assert legal conclusions to which no response is required.

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FIFTH CAUSE OF ACTION

50. Defendant repeats and realleges its responses to paragraphs 1 through 49 of the complaint as though fully set forth herein.

51. With respect to the allegations contained in paragraph 51 of the complaint, Defendant refers the court to the Indenture for the full and complete provisions thereof.

52. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 52 of the complaint.

AFFIRMATIVE DEFENSE

53. The Defendant, through its ownership in several subsidiaries (the "Subsidiaries"), owns interests in thirteen Chinese foreign cooperative joint ventures (the "Joint Ventures").

54. The Joint Ventures are engaged in the development, construction and operation of six toll road projects (the "Toll Roads Projects") in the People's Republic of China ("China").

55. The Defendant's interests in the Subsidiaries are the Defendant's sole assets and sole source of income.

56. The Joint Ventures are foreign investment enterprises under Chinese law, specifically China-Foreign Cooperative Joint Ventures ("CJVs").

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57. The distribution of funds from CJVs to their foreign partners or equity holders is regulated by Chinese law, and the conversion of such funds from local currency to foreign currency, such as the United States dollar, for remittance outside China is subject to foreign exchange regulations.

58. Under the contracts governing the Joint Ventures, the Defendant's Subsidiaries, as the foreign partners in the Joint Ventures, are guaranteed a fixed annual return on their investment in each Joint Venture. To the extent the income of a Joint Venture is insufficient to fund such guaranteed amounts, the shortfall is required to be contributed by the Chinese partner.

59. Prior to September 1998, local foreign exchange authorities, which are responsible for approving the remittance of distributions of CJVs (including the Joint Ventures), regularly permitted amounts derived from guaranteed payments by Chinese partners of the Joint Ventures to be converted into foreign currency and remitted outside China.

60. On September 14, 1998, the Chinese State Administration of Foreign Exchange ("SAFE") issued a notice that, among other things, provided strict standards for attracting foreign capital and measures to rectify and prevent the guarantee of the return on investment of foreign parties by Chinese joint venture partners.

61. As a consequence of the change in policy of the central Chinese Government regarding the remittance of distributions by CJVs and other Chinese-Foreign joint

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ventures, local authorities became more restrictive and take substantially more time to approve the remittance of foreign exchange outside China. Approval for the remittance of amounts attributable to guaranteed payments by Chinese joint venture partners in particular became especially difficult and was granted only after special approval from SAFE had been obtained.

62. The Defendant became incapable of making the payments required under the Indenture as a result of its Subsidiaries' inability to collect in a timely fashion the guaranteed payments from their Chinese partners due to the regulatory and policy changes under Chinese law.

63. The Defendant's alleged defaults under the Indenture are due to the regulatory and policy changes in China, are completely beyond the Defendant's control and were not within its reasonable anticipation.

64. The Defendant asserts that its alleged defaults under the Indenture are excused and discharged pursuant to the doctrine of impossibility of performance.

WHEREFORE, the Defendant respectfully requests that the Court dismiss the complaint and grant it such other and further relief as is just.

Dated: New York, New York
August 6, 1999

Appendix D

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Attorneys for Traffic Stream (BVI)
Infrastructure Limited

By: s/ George A. Zimmerman
(A Member of the Firm)

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To: Sara L Reid, Esq.
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101 Park Avenue
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APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 9, 2000 ENTERED MAY 11, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 **CIVIL** 4056(SAS)

THE CHASE MANHATTAN BANK, AS INDENTURE TRUSTEE, UNDER THE INDENTURE, DATED AS OF MAY 6, 1998,

Plaintiff,

-against-

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Defendant.

JUDGMENT

Whereas in an Opinion and Order dated February 2, 2000, the Court having granted summary judgment in plaintiff's favor and having ordered plaintiff to foreclose on certain Collateral Accounts and to submit a request for a deficiency judgment and the matter having come before the Honorable Shira A. Scheindlin, United States District Judge, and the Court, on May 8, 2000, having issued its Opinion and Order directing a deficiency judgment in the amount of $98,388,352.74 as against the defendant, it is,

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ORDERED, ADJUDGED AND DECREED: That pursuant to the Court's Opinion and Order dated May 8, 2000, a deficiency judgment is entered in the amount of $98,388,352.74; the Court also finds that the value of certain additional collateral, namely pledged shares of four Hong Kong companies owned by defendant and/or its shareholders will be applied against the deficiency judgment when two conditions have been satisfied, specifically transfer of ownership and an adequate, independent valuation, the value of these companies.

DATED: New York, New York
May 9, 2000

JAMES M PARKISON:

_____
CLERK

BY: s/ [illegible]
DEPUTY CLERK

APPENDIX F — SUPPLEMENTAL LETTER BRIEF FOR DEFENDANT-APPELLANT DATED DECEMBER 11, 2000

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* * *

December 11, 2000

BY HAND

Hon. Joseph M. McLaughlin
Hon. Robert D. Sack
Hon. Robert N. Chatigny
United States Court of Appeals for the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

Re: The Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd., No. 00-7721
Alienage Jurisdiction

Dear Judges McLaughlin, Sack and Chatigny:

During oral argument in the above-captioned appeal held on Friday, December 1, 2000, the Court asked the parties to address the jurisdictional basis for the above-captioned action

in light of *Universal Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 224 F.3d 139 (2d Cir. 2000); *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *as amended by* 229 F.3d 424 (2d Cir.), *reh'g in banc denied*, 229 F.3d 187 (2d Cir. 2000), and *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998), and requested a written response no later than Monday, December 11, 2000.

As the Court noted, the subject matter jurisdictional nexus for this action is divined from the alienage jurisdiction provision of 28 U.S.C. § 1332. Section 1332 provides that when there is a civil action where the matter in controversy exceeds $75,000, and where the controversy is between "citizens of a State and citizens or subject of a foreign state," federal jurisdiction is present. 28 U.S.C. § 1332(a)(2).

In *Matimak v. Khalily*, 118 F.3d 76 (2d Cir. 1997), this Court, in a decision that reviewed and considered a myriad of precedents concerning this issue, reviewed the district court's decision to dismiss the action for lack of subject matter jurisdiction because the plaintiff, a Hong Kong corporation, was not a "citizen or subject of a foreign state" for purposes of alienage jurisdiction. Because Hong Kong — then a British Dependent Territory — had not been granted formal recognition by the Executive Branch, the Court concluded that it was not a "foreign state." *Id.* at 80-82. Nor was a Hong Kong corporation a citizen or subject of the United Kingdom. *Id.* at 85-86. Accordingly, the Court concluded that the plaintiff Hong Kong corporation was "stateless," and that alienage jurisdiction was therefore not available. *Id.* at 86-88.

The holding of *Matimak* was extended in *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *as amended* 229 F.3d 424 (2d Cir.), *reh'g in banc denied*, 229 F.3d 187 (2d Cir. 2000), where the Court held that Bermuda citizens and Bermuda corporations are not citizens or subjects of a foreign state for purposes of alienage jurisdiction. As in *Matimak*, the Court concluded that because Bermuda — another British Dependent Territory — has not been recognized as a foreign state by the United States, its citizens are effectively stateless. Accordingly, because alienage jurisdiction was lacking, the Court affirmed dismissal of the state law claims against the Bermuda defendants. *Id.* at 139. Similarly, in *Universal Reinsurance Co. v. St. Paul Marine and Fire Ins. Co.*, 224 F.3d 139, 140-41 (2d Cir. 2000), the Court applied *Matimak* and *Koehler* and restated that citizens and corporations of Bermuda are not citizen or subjects of a foreign state for purposes of alienage jurisdiction.

Recently, in *New Heaven Properties Ltd. v. Grinberg*, No. 99 Civ. 11546, 2000 U.S. Dist LEXIS 706, *5-*8 (S.D.N.Y., Jan. 26, 2000) (unpublished memorandum and order, a copy of *New Heaven* is attached), the district court addressed the very jurisdictional issue raised by the Court: Is an action between a New York corporation and a British Virgin Islands corporation an action between a citizen of a State and a citizen or subject of a foreign state? Finding that there was no distinction in status between Bermuda and the British Virgin Islands, *i.e.*, both are British Overseas Territories, Judge McKenna, following *Matimak*, answered the question in the negative and dismissed the action for want of jurisdiction. *Id.*

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The British Virgin Islands, like Bermuda and the Cayman Islands, are considered British Dependent Territories. *See* British Nationality Act of 1981 ch. 61, § 50(1), sch. 6 (listing the British Dependent Territories, which include, among others, Bermuda, the British Virgin Islands, and the Cayman Islands). Moreover, these dependent territories have not been formally recognized as foreign states by the United States. *See Koehler*, 209 F.3d at 139; *New Heaven*, 2000 U.S. Dist. LEXIS 706, at *5-*6. Nor are their citizens or corporations considered citizens or subjects of the United Kingdom. *See Matimak*, 118 F.3d at 85-86; *Koehler*, 209 F.3d at 139 (stating that "a corporation is a citizen or subject of the entity under whose sovereignty it is created"). *Cf.* British Nationality Act of 1981 ch. 61, § 50(1) (expressly defining the United Kingdom to include only Great Britain, Northern Ireland, the Channel Islands, and the Isle of Man). Under *Matimak* and its progeny, it appears that these facts warrant dismissal for lack of subject matter jurisdiction.[1]

1. To be sure, *Matimak* is not without detractors. In *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd.*, 181 F.3d 410, 417-18 (3d Cir. 1999), the Third Circuit expressly disagreed with *Matimak* and instead relied upon the State Department's position that a Hong Kong corporation should be treated as a "subject" of the United Kingdom for purposes of diversity jurisdiction. Of course, the same argument was advanced by the Justice Department in *Matimak* and rejected. *See Matimak*, 118 F.3d at 86. Even on the Second Circuit bench there is some disagreement. In an order amending *Koehler*, Judges Cardamone and Newman asserted that absent *Matimak*, they would rule that citizens of Bermuda and other British Dependent territories are essentially subjects of the United Kingdom for purposes of alienage jurisdiction. *See Koehler v. Bank of Bermuda (New York) Ltd.*, 229 F.3d 424 (Cont'd)

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See, e.g., Universal Reinsurance, 224 F.3d at 142 (noting the even though action proceeded to final judgment if alienage jurisdiction is lacking the decision must be vacated and the case dismissed without prejudice).

In summary, because the British Virgin Islands is not a "foreign state," Traffic Stream, as a British Virgin Islands corporation, cannot be a "citizen or subject of a foreign state" for purposes of alienage jurisdiction. *See* 28 U.S.C. § 1332(a)(2).

Respectfully submitted,

s/ Shmuel Vasser
Shmuel Vasser

Enclosure

cc: Sarah L. Reid, Esq (by hand)
Kelley Drye & Warren LLP
101 Park Avenue
New York, NY 10178

(Cont'd)
(2d Cir. 2000). In addition, Judges Leval, Calabresi, and Sotomayor dissented from a denial of rehearing in banc in *Koehler* and suggested that this "issue of exceptional importance" should be reviewed by the entire Court. *See Koehler v. Bank of Bermuda (New York) Ltd.*, 229 F.3d 187, 193-94 (2d Cir. 2000).

Appendix F

ATTACHMENT TO SUPPLEMENTAL LETTER BRIEF — MEMORANDUM AND ORDER IN *NEW HEAVEN PROPERTIES LTD. v. GRINBERG*

NEW HEAVEN PROPERTIES LTD., Plaintiff, -against- SERGEY GRINBERG, GREEN SKY INTERNATIONAL TRADING CORP., CAPSTONE INVESTMENT CORP., JOSEPH F. INGRASSIA, JOHN R. RICE III and CAPSTONE & COMPANY, LLC., Defendants.

99 Civ.11546 (LMM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2000 U.S. Dist. LEXIS 706

January 24, 2000, Decided

January 26, 2000, Filed

* * *

MEMORANDUM AND ORDER

McKENNA, D.J.

1.

Defendants Grinberg and Green Sky International Trading Corp. ("Green Sky") move, pursuant to Fed. R. Civ. P. 12(b)(1), for an order dismissing this action for lack of subject matter jurisdiction. Plaintiff moves, pursuant to *id.* 41(a)(2), for an order of voluntary dismissal without prejudice.

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The complaint alleges that plaintiff is a British Virgin Islands corporation (but does not allege the location of its principal place of business), that the individual defendants are residents of New York, and that the other defendants are New York entities, the principal "office[s]" of which are located in New York. Subject matter jurisdiction is predicated on 28 U.S.C. § 1332(a)(2). No federal question is alleged.

Grinberg and Green Sky assert that there is no subject matter jurisdiction because plaintiff's principal place of business is in New York and (in the alternative) that plaintiff is not the real party in interest, which is either Boviol International Corp. or NASL Corp., both said to be New York corporations.

Plaintiff seeks a voluntary dismissal because it appears that there may not be subject matter jurisdiction under *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997). *Matimak* has been followed in several Southern District cases cited by plaintiff. *Koehler v. Bank of Bermuda (New York) Ltd.*, 1998 U.S. Dist. LEXIS 13574, No. 96 Civ. 7885 (JFK), 1998 WL 557595 (S.D.N.Y. Sept. 2, 1998); *United States Fidelity & Guar. Co. v. Braspetro Oil Servs. Co.*, 1999 U.S. Dist. LEXIS 7236, No. 97 Civ. 6124 (JGK), 1999 WL 307666 (S.D.N.Y. May 17, 1999); and *III Fin. Ltd. v. Aegis Consumer Funding Group, Inc.*, 1999 U.S. Dist. LEXIS 18518, No. 99 Civ. 2579 (DC), 1999 WL 1080371 (S.D.N.Y. Nov. 30, 1999).

Defendants Ingrassia, Rice and Capstone & Company, LLC, while they join in the motion of Grinberg and Green Sky, made it clear at oral argument that their main concern is that, if the present case is dismissed and plaintiff brings

substantially the same case in the New York State Supreme Court (as it says it intends to do if this case is dismissed) plaintiff should not be allowed to then seek dismissal in the state court and commence a third action in this Court, with the further expense and inconvenience that would cause.

2.

The Court considers its subject matter jurisdiction first. *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 929-30 (2d Cir. 1998).

3.

The motion of Grinberg and Green Sky presents, as to both of its alternative grounds, factual issues which (to the extent relevant) cannot be resolved except at a hearing or, perhaps, by the submission of further papers, preceded, in fairness to both sides, by some discovery. *See Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986).

The complaint, however, must be dismissed for lack of subject matter jurisdiction on a different ground, that brought to the Court's attention by plaintiff's motion.

28 U.S.C. § 1332(a)(2), on which plaintiff premises subject matter jurisdiction, grants the district courts subject matter jurisdiction "of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between . . . (2) citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. § 1332(a)(2). In *Matimak*, the court held that a Hong Kong

corporation was "not a 'citizen or subject of a foreign state,' under 28 U.S.C. § 1332(a)(2)." 118 F.3d at 88. In *Koehler*, Judge Keenan applied *Matimak* as controlling in finding that two Bermuda corporations (in addition to an individual resident of Bermuda) were "not citizens of a foreign state for purposes of diversity jurisdiction." 1998 WL 557595 at *7. In *United States Fidelity & Guaranty*, Judge Koeltl similarly applied *Matimak* in finding that a Cayman Islands corporation was "not a 'citizen or subject of a foreign state' within the meaning of 28 U.S.C. § 1332(a)(2)." 1999 WL 307666 at *4. And in *III Finance*, Judge Chin also found, under *Matimak*, that a Cayman Islands corporation was not "a 'citizen or subject' of a 'foreign state.'" 1999 WL 1080371 at *3.[1] The Court must follow *Matimak*, and concludes that *Koehler, United States Fidelity & Guaranty, III Finance* and *Klein* all correctly apply *Matimak*.

Counsel for plaintiff notes that he is not aware of a distinction between Bermuda and the Cayman Islands, on the one hand, and the British Virgin Islands, on the other (Dannenberg Aff. P 7), and the Court is also unaware of any such distinction. *III Finance* supports the proposition that there is none. *See* 1999 WL 1080371 at *1 n.1 (classifying,

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1. See also *Klein v. Marriott Int'l., Inc.*, 34 F. Supp. 2d 176 (S.D.N.Y. 1999), in which Judge Connor applied *Matimak* to find that a Bermuda corporation was "not a 'citizen or subject of a foreign state' within the meaning of 28 U.S.C. § 1332(a)(3)." 34 F. Supp. 2d at 179. Judge Connor noted that, under *Matimak*, the term "foreign state" was to be construed consistently throughout the jurisdictional statute, i.e., in the same way in 28 U.S.C. § 1332(a)(2) and *id.* (a)(3). 34 F. Supp. 2d at 179 n.10.

as "British Overseas Territories," Bermuda, the British Virgin Islands and the Cayman Islands (among others)).[2]

The location of plaintiff's principal place of business — which plaintiff asserts is Russia, although the complaint does not allege that — is irrelevant to the subject matter jurisdiction issue, because, as put by Judge Bonsal in *Mazzella v. Panoceanica A/S Panama*, 232 F. Supp. 29 (S.D.N.Y. 1964), "subsection (c) of 28 U.S.C. § 1332, which makes a corporation a citizen for diversity purposes of the state in which the corporation has its principal place of business, does not apply to alien corporations." 232 F. Supp. at 31 n.1 (citing *Eisenberg v. Commercial Union Assurance Co.*, 189 F. Supp. 500 (S.D.N.Y. 1960)). In *Eisenberg*, Judge Dimock explained:

> It is to be noted that the statute differentiates between States of the United States and foreign states by the use of a capital S for the word when applied to a State of the United States. Subdivision (c), therefore, in dealing with the place of incorporation refers only to a corporation incorporated in a State of the United States. When subdivision (c) goes on to deal with principal place of business it refers to the same corporation and thus only to a corporation incorporated in a State of the United States.

189 F. Supp. at 502.

2. The source of the cited note in *III Finance* is a White Paper, "Partnership for Progress and Prosperity, Britain and the Overseas Territories," prepared by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty in March 1999. (Ex. A. to Aff. of James Arden, Esq., filed in *III Finance*).

In *Clarkson Co. v. Shaheen*, 544 F.2d 624 (2d Cir. 1976), the Second Circuit, in what appears to be dictum, expressed the view that the quoted reasoning of Eisenberg is probably the correct one. "As alien corporations organized under the laws of another country, PRC and NRC are probably deemed to be citizens exclusively of Canada for diversity purposes." 544 F.2d at 628 n.5. The Court of Appeals described Eisenberg as "the leading case on the subject." *Id.*

For the foregoing reasons, the Court concludes that it does not have subject matter jurisdiction of this case.

4.

In view of the above, the Court need not reach plaintiff's motion for voluntary dismissal without prejudice. Aware, however, that there are different views of the applicability of 28 U.S.C. § 1332(c) to alien corporations, *see, e.g.*, *Bergen Shipping Co. v. Japan Marine Servs., Ltd.*, 386 F. Supp. 430, 432-33 (S.D.N.Y 1974), the Court notes that, were it to reach plaintiff's motion, it would grant it at this early stage of the litigation, but on the condition, *see* Fed. R. Civ. P. 41(a)(2), that the dismissal be with prejudice to reinstituting the case in this Court on an assertion of subject matter jurisdiction based on 28 U.S.C. § 1332, in order to avoid the kind of prejudice suggested by defendants Ingrassia, Rice and Capstone & Company, LLC.

* * * Complaint dismissed for lack of subject matter jurisdiction.

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SO ORDERED.

Dated: January 24, 2000

Lawrence M. McKenna

U.S.D.J.

APPENDIX G — SUPPLEMENTAL BRIEF FOR PLAINTIFF-APPELLEE DATED DECEMBER 18, 2000

00-7721

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

THE CHASE MANHATTAN BANK, as Indenture Trustee, under the Indenture, dated as of May 6, 1998,

Plaintiff-Appellee,

-against-

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR PLAINTIFF-APPELLEE

Kelley Drye & Warren LLP
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* * *

Appendix G

PRELIMINARY STATEMENT

Plaintiff-Appellee, The Chase Manhattan Bank, as Indenture Trustee (the "Trustee" or "Chase"), under the Indenture, dated as of May 6, 1998 (the "Indenture"), of Traffic Stream (BVI) Infrastructure Limited ("Traffic Stream"), pursuant to which were issued $119,000,000 aggregate principal amount of Traffic Stream's 14¼% Senior Secured Notes due 2006 (the "Notes"), submits this supplemental brief in opposition to Traffic Stream's appeal from the judgment entered by the United States District Court for the Southern District of New York on May 9, 2000, based upon the Opinion and Order of the Honorable Shira A. Scheindlin, dated January 31, 2000, granting Chase's motion for summary judgment.

FURTHER ISSUES PRESENTED ON APPEAL

1. Do the Federal Courts have subject matter jurisdiction over an action by a New York corporation against a British Virgin Islands corporation under the alienage jurisdiction provisions of 28 U.S.C. § 1332(a)(2) in view of the uniform positions of the United States, the United Kingdom and the British Virgin Islands that residents and corporations from United Kingdom Overseas Territories, including the British Virgin Islands, are subjects of the United Kingdom and thus entitled to invoke such jurisdiction?

2. Should this Panel overrule *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41 (2d Cir. 1996), which held that diversity jurisdiction does exist in the case of a British Virgin Islands corporation?

Appendix G

FURTHER STATEMENT OF THE CASE

At oral argument for this appeal on December 1, 2000, this Panel, *sua sponte*, raised the issue of whether subject matter jurisdiction existed under 28 U.S.C. § 1332(a)(2) in light of the fact that the defendant Traffic Stream was incorporated in an United Kingdom Overseas Territory, namely the British Virgin Islands. The Panel referred the parties to three cases in which the Second Circuit found that residents and corporations from Hong Kong and Bermuda were not "citizens or subjects of a foreign state" for purposes of alienage jurisdiction. Specifically, these cases were: *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998); *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *amended by* 229 F.3d 424 (2d Cir.), *reh'g en banc denied by* 229 F.3d 187 (2d Cir. 2000); and, *Universal Reinsurance Co., Ltd. v. St. Paul Fire & Marine Insurance Co.*, 224 F.3d 139 (2d Cir. 2000) (collectively the "Matimak line of cases").

This issue is being raised after the District Court ordered Chase to foreclose on over $47 million of collateral prior to submitting its request for a deficiency judgment. (JA 375). *See* Chase's Brief as Appellee, dated September 22, 2000 (hereafter "Chase Brief'), at 6 n.4. Because Traffic Stream has not posted any appeal bond or otherwise sought any stay pending appeal, Chase, after specific direction from the Holders of the Notes ("Noteholders"), disbursed most of the $47 million to the Noteholders. Even after this foreclosure, Traffic Stream still owes Chase (and the Noteholders) over $98 million, which is the amount of the deficiency judgment which was entered by the Clerk after the District Court's opinion and order (JA 429-30). *See* Chase's Brief, at 14.

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Chase respectfully submits that it would be inappropriate for this Panel to extend the Matimak line of cases to the British Virgin Islands, in view of the 1996 precedent of this Court which found that jurisdiction existed in a case involving a British Virgin Islands corporation. *Peregrine Myanmar Ltd. v. Sepal*, 89 F.3d 41, 45 n.4 (2d Cir. 1996). This is particularly true where the public positions of the United Kingdom, the Attorney General of the British Virgin Islands and the Department of State, as expressed in publicly-filed amicus briefs filed earlier this year, are available to this Panel and compel the conclusion even under the *Matimak* analysis that the residents and corporations of the British Virgin Islands are "subjects" of the United Kingdom, and hence entitled to invoke alienage jurisdiction.

ARGUMENT

I.

APPLYING MATIMAK TO THE RESIDENTS AND CORPORATIONS OF THE BRITISH VIRGIN ISLANDS WOULD OVERRULE THIS COURT'S PRIOR PRECEDENT

In a case that preceded Matimak, the Second Circuit in *Peregrine Myanmar Ltd. v. Segal* was faced with a situation where a plaintiff, which was incorporated in the British Virgin Islands, brought an action against a defendant that was domiciled in New York. 89 F.3d at 45 n.4. The plaintiffs asserted state law claims that included breach of contract, breach of fiduciary duty, unfair competition and tortious

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interference with prospective economic advantage. *Id.* at 43. The Court held that:

> [Defendant] admits on appeal that she is domiciled in New York (which the evidence supports) and that the district court therefore had subject matter jurisdiction over the case. [One plaintiff] is incorporated in the British Virgin Islands and [the other plaintiff] is incorporated in Myanmar. Both have their principal place of business in Myanmar. There is therefore complete diversity between the parties.

Peregrine Myanmar Ltd., 89 F.3d at 45 n.4.

For this Panel to now hold that there is no subject matter jurisdiction because Traffic Stream is incorporated in the British Virgin Islands, this Panel would have to overrule *Peregrine Myanmar Ltd.* Rather than overrule *Peregrine Myanmar Ltd.*, Chase urges this Panel to conclude that there is subject matter jurisdiction for actions involving residents and corporations from the British Virgin Islands.[1] Otherwise

---

1. Although in *New Heaven Properties Ltd. v. Grinberg*, 2000 WL 64842 (S.D.N.Y. Jan. 26, 2000) Judge McKenna found that there was no subject matter jurisdiction for a case involving a British Virgin Islands plaintiff, Chase urges this Court to follow the multiple actions from the Southern District that involved parties from the British Virgin Islands. *See, e.g., One Hundred Pearl Ltd. v. Vantage Sec. Inc.*, 887 F. Supp. 636, 637 (S.D.N.Y. 1995); *Charles Ulmer, Inc., Sailmakers v. Van Ost*, 1991 WL 29277 (S.D.N.Y. Feb. 26, 1991) (Defendant in caption listed as "BVI" corporation); *Lama Holding Co. v. Shearman & Sterling*, 758 F. Supp. 159, 160 (S.D.N.Y. 1991).

Chase respectfully suggests that the Panel refer the matter for en banc consideration in view of the public importance of the issues raised, the disagreement among the Court as to the application of *Matimak* (*see, Koehler v. Bank of Bermuda (New York) Ltd.*, 229 F.3d. 187 (2d Cir. 2000) (Sotomayor, J., dissenting)), and the fact that both the Department of State and the United Kingdom have expressed a desire to present their views to the Second Circuit in view of their disagreement with the *Matimak* decision.

II.

MATIMAK WAS DECIDED WITHOUT THE BENEFIT OF CERTAIN INFORMATION WHICH WOULD LEAD TO A CONCLUSION THAT THE RESIDENTS AND CORPORATIONS OF THE BRITISH VIRGIN ISLANDS ARE THE SUBJECTS OF THE UNITED KINGDOM

In *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998) the Court held that residents and corporations from Hong Kong were not "citizens or subjects of a foreign state" for purposes of alienage jurisdiction. While the *Matimak* decision concerned Hong Kong, later decisions have applied its analysis to other United Kingdom Overseas Territories. *See, e.g., Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *amended by* 229 F.3d 424 (2d Cir.), *reh'g en banc denied by* 229 F.3d 187 (2d Cir. 2000) (Bermuda); *III Finance Ltd. v. Aegis Consumer Funding Group, Inc.*, 1999 WL 1080371 (S.D.N.Y. Nov. 30, 1999) (Cayman Islands). Before this Court extends *Matimak* to the British Virgin Islands, it is important that the Court consider information that is available to this

Panel, which was not available to the *Matimak* Court, namely the amici briefs filed by the United Kingdom and the Department of State earlier this year in a case involving the very issue of alienage jurisdiction over a British Virgin Islands corporation. These briefs, which were submitted to the United States Court of Appeals for the Firth Circuit in the matter captioned *ART 57 Properties, Inc. v. 57 BB Property, L.L.C.*, No. 99-10385 (5th Cir.) (affirmance reported at 212 F.3d 596 (5th Cir. 2000)), are attached hereto at Appendix I.[2]

In particular, the *Matimak* court did not have the position of the United Kingdom before it. *Matimak Trading Co.*, 118 F.3d at 78 (listing only the United States Department of Justice as amicus curiae); *see also Favour Mind Ltd. v. Pacific Shores, Inc.*, 1999 WL 1115217, at *4 (S.D.N.Y. Dec. 7, 1999) ("[In *Matimak*] the Second Circuit had before it no affirmative evidence that the government of Great Britain considered Hong Kong Corporations to be British Citizens.") Accordingly, as set forth in the UK ART 57 Brief at point III, the *Matimak* Court misinterpreted the law of the United Kingdom, and thus altered the result of the analysis that was applied in *Matimak*.

At the core of the *Matimak* analysis was "the truism that a foreign state is entitled to define who are its citizens or subjects." *Matimak Trading Co.*, 118 F.3d at 85. The Court in *Matimak* then went on to try to determine whether the United Kingdom considered corporations from the United

2. Hereinafter, the United Kingdom's and the State Department's briefs in the *ART 57 Properties, Inc.* matter will be referred to as the "UK ART 57 Brief" and the "US ART 57 Brief," respectively.

Kingdom Overseas Territories as citizens or subjects of the United Kingdom. *Id.* at 85-86. The Court looked to both the British Nationality Act 1981 and the British Companies Act 1948. *Id.* The *Matimak* court concluded that under the law of the United Kingdom, corporations from the Overseas Territories were not citizens or subjects of the United Kingdom, and thus were "stateless". *Id.* at 86. The United Kingdom, interpreting its laws, disagrees.

A. The United Kingdom Considers British Virgin Island Corporations to be "Citizens or Subjects" of the United Kingdom

Since *Matimak* the United Kingdom has made several court submissions that make it extremely clear: The United Kingdom, under its own laws, considers the residents and corporations of its Overseas Territories to be "citizens or subjects" of the United Kingdom. *See* UK ART 57 Brief.[3]

The UK ART 57 Brief states that "[t]he position of the United Kingdom Government is that entities incorporated in any territory for which the United Kingdom is

3. The UK ART 57 Brief is by no means the only time that the United Kingdom has asserted that the residents and corporations of its Overseas Territories are its subjects. This position was also asserted in the United Kingdom's amicus curiae brief in support of a petition for a writ of certiorari to the Supreme Court in *Matimak* (hereinafter "UK Matimak Brief") and the United Kingdom's amicus curiae brief in support of the plaintiff's opposition to a motion to dismiss in the matter captioned *III Finance Ltd. v. Aegis Consumer Funding Group, Inc.*, No. 99 Civ. 2579 (DC) (S.D.N.Y.) [decision reported at 1999 WL 1080371 (S.D.N.Y. Nov. 30, 1999)] (hereinafter "UK III Finance Brief").

internationally responsible are regarded by the United Kingdom Government as United Kingdom nationals and, therefore are 'citizens or subjects' of the United Kingdom for purposes of alienage jurisdiction." *See* UK ART 57 Brief, at 4-5.

The UK ART 57 Brief goes on to explain that while "Great Britain" is the collective term for England and Wales, and Scotland, the "United Kingdom," as a State and subject of international law, includes Northern Ireland, the United Kingdom Overseas Territories and the Crown Dependencies. *See* UK ART 57 Brief, at 5. Like England and Wales, Scotland, and Northern Ireland, each Overseas Territory and Crown Dependency are separate law districts, entitled to enact their own laws in accordance with their constitutions. *See* UK ART 57 Brief, at 6. Although each law district has separate laws, they all belong to one state, the United Kingdom, and are subject to United Kingdom sovereignty. *See* UK ART 57 Brief, at 6.

In the UK ART 57 Brief, the United Kingdom provided proof of its open declaration of willingness to recognize and take responsibility for entities organized under the laws of the United Kingdom's Overseas Territories. *See* UK ART 57 Brief, at 6-8. Importantly, under the United Kingdom Government's Diplomatic Service Procedure Manual, Vol. 7, Annex 1 (Mar. 1996) (a copy of which is annexed to the UK ART 57 Brief as Exhibit 2), the term "United Kingdom National" is defined to include "[c]ompanies incorporated under the law of the United Kingdom or of any territory for which the United Kingdom is internationally responsible." *See* UK ART 57 Brief, at Exhibit 2, Rule 1(b).

Appendix G

The fact that the United Kingdom would opine that the citizens and corporations formed under the laws of the United Kingdom's Overseas Territories are United Kingdom subjects is not surprising in light of the "close and wide-ranging" constitutional relationship between the "metropolitan" United Kingdom[4] and the United Kingdom Overseas Territories. *See* UK ART 57 Brief, at 14. For example, the Governor of the British Virgin Islands, which is appointed by the Queen, is responsible for core government functions like internal security, public service and court administration. *Id.* Similarly, any bill passed by the Legislative Council of the British Virgin Islands must be approved by the Governor and the Queen, with such procedure including a careful review by the Foreign and Commonwealth Office. *See* UK ART 57 Brief, at 14-15.

In fact, the very law under which Traffic Stream is incorporated in the British Virgin Islands as an "international business company", namely Chapter 291 of the Revised Laws of the Virgin Islands, was enacted pursuant to a specific grant in the 1976 British Virgin Islands Constitution.[5] This "trend sett[ing]" statute has made the British Virgin Islands a well known tax haven and has led to it "being characterized as an

4. The "metropolitan" United Kingdom includes England and Wales, Scotland and Northern Ireland. *See* UK ART 57 Brief, at 5.

5. The 1976 British Virgin Islands Constitution was issued by Queen Elizabeth as an Order in Council, acting pursuant to her sovereign prerogative and statutory authority from Parliament under Section 5 of the West Indies Act. 6 Halsbury's Laws of England, United Kingdom Dependencies ¶ 1079 (1991), *citing*, *inter alia*, West Indies Act 1962, § 5.

Appendix G

'offshore Delaware.'" W. & D. Diamond, 1 *Tax Havens of the World, British Virgin Islands* 1, 2 (1999). Thus, corporations organized under this statute, which created "international business corporations", are subjects of the United Kingdom's sovereignty.

1. *According to the United Kingdom, the Companies Act 1948 Does Not Support the Matimak Result*

As is pointed out in the UK ART 57 Brief, the *Matimak* court's reliance on the Companies Act 1948 was misplaced.[6] *See* UK ART 57 Brief, at 11-12. The court in *Matimak* apparently concluded that only corporations incorporated under that act could be considered a United Kingdom company. This view, however, confuses "Great Britain" with the "United Kingdom" and fails to recognize that each law district has an equivalent of the Companies Act.[7] "The companies legislation of one law district is not superior to or more authentic than that of another." *See* UK ART 57 Brief, at 11. In fact, as the Diplomatic Service Procedure Manual indicates, all companies incorporated in any of the United Kingdom's law districts are entitled to the full protection of the United Kingdom in their dealings with foreign states. *Id.*

6. The Companies Act 1948 was replaced by the Companies Act 1985. *See* Companies Act, 1985, ch. 6 (Eng.).

7. For example, companies in Northern Ireland, which is a separate law district, are incorporated not under the Companies Act 1985 but under the Companies (Northern Ireland) Order 1986, No. 1032, ch.6 (N.Ir.). *See* UK ART 57 Brief, at 12.

2. *The BVI Attorney General Has Opined That BVI Corporations are Subjects of The United Kingdom*

This Panel also has the advantage of a statement from the British Virgin Islands' Attorney General that fully supports the conclusion that residents and corporations of the British Virgin Islands are subjects of the United Kingdom. *See* UK ART 57 Brief, at Exhibit 3 ("On behalf of the Government of the British Virgin Islands, I fully support the arguments and conclusions presented in the [*ART 57 Properties*] Brief of the United Kingdom.").

Under the appropriate standards, this Panel should give deference to the United Kingdom's statement of who are its citizens and subjects, which is concurred in by the British Virgin Islands itself. It is axiomatic that the best interpreter of the laws of a foreign nation is the foreign nation itself. When a foreign land provides a court of the United States with that foreign nation's interpretation of its own laws, that interpretation should be given great deference. *Iwanowa v. Ford Motor Co.*, 67 F.Supp. 2d 424, 490 (D. N.J. 1999). As was recognized by the Court in *Matimak*, a foreign nation is entitled to define who are its citizens and subjects, which should be recognized by other nations. *See United States v. Wong Kim Ark*, 169 U.S. 649, 668 (1898) ("Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."); *Murarka v. Bachrack Bros.*, 215 F.2d 547, 553 (2d Cir. 1954) ("It is the undoubted right of each country to determine who are its nationals, and it seems to be general international usage that such a determination

will usually be accepted by other nations."); *see also Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 285 (7th Cir. 1990) ("[G]enerally accepted test for determining whether a person is a foreign citizen for purposes of 28 U.S.C. § 1332(a)(2) is whether the country in which citizenship is claimed would so recognize him.")

To ignore such a statement would be tantamount to telling the government of the United Kingdom that a United States court is better suited to determine who its citizens and subjects are.[8]

B. The Matimak Ruling Has Caused and Continues to Cause Foreign Entanglements with the United Kingdom

Another important part of the *Matimak* analysis was the concept that because residents and corporations from the United Kingdom's Overseas Territories were "stateless" there would be no problems of foreign policy entanglements. *See Matimak Trading Co.*, 118 F.3d at 87 ("there is no danger

8. In *Favour Mind Ltd. v. Pacific Shores, Inc.*, 1999 WL 1115217 (S.D.N.Y. Dec. 7, 1999), Judge Scheindlin, in addressing the issue of whether corporations from post-reversion Hong Kong were now residents of China, held that "this explicit statement by China compels this Court to find that Hong Kong SAR corporations are citizens of China and that Favour Mind may therefore invoke the alienage jurisdiction of the federal district courts." *Id.* at *7. Judge Scheindlin went on to note as important that in *Favour Mind*, "unlike in *Matimak*, the three relevant governments — the United States, the Hong Kong SAR and, most important, China — all agree that Hong Kong SAR corporations are citizens of China. *Id.* at *7 n.12.

of foreign entanglements, as there is no sovereign with whom the United States could become entangled.") Based on the submissions from both the United Kingdom and the United States Department of State, it is now evident that such a ruling has created entanglements with one of this country's closest allies.

As the court in *Matimak* stated, "[t]he raison d'etre of alienage jurisdiction is to avoid 'entanglements with other sovereigns that might ensue from failure to treat the legal controversies of aliens on a national level'." *Matimak Trading Co.*, 118 F.3d at 82 (quoting *Iran Handicraft & Carpet Exp. Ctr. v. Marjan Int'l Corp.*, 655 F. Supp. 1275, 1277 (S.D.N.Y.), *aff'd* 868 F.2d 1267 (2d Cir. 1988)); *see also Sadat v. Mertes*, 615 F.2d 1176, 1186 (7th Cir. 1980) ("[T]he paramount purpose of the alienage jurisdiction provision [is] to avoid offense to foreign nations because of the possible appearance of injustice to their citizens.").

The result of *Matimak*, the treatment of residents and corporations from the United Kingdom's Overseas Territories as "stateless" and, thus, denying them the ability to bring suit in Federal Court, has clearly created concern for the United Kingdom and embroiled the Department of State in an "entanglement" with the government of the United Kingdom.[9] The Matimak decision has created the very

9. As Judge Sotomayor noted in her opinion dissenting from the denial of an en banc review of the *Koehler v. Bank of Bermuda (New York) Ltd.* matter: "[T]here can be no doubt that the fundamental purpose of alienage jurisdiction — to void offense to foreign nations — is frustrated by the Matimak decision and its further application (Cont'd)

problem that alienage jurisdiction was designed to prevent, namely an international tension with a valued ally and important trading partner.

The fact that the United Kingdom is concerned over this issue is self-evident from the fact that the United Kingdom submitted the UK ART 57 Brief, the UK Matimak Brief and the UK III Finance Brief to the Courts of the United States. In addition, the United Kingdom has also issued a Diplomatic Note that specifically expressed the United Kingdom's "concern about a number of judicial decisions which have denied corporations of United Kingdom Overseas Territories access to United States Federal Courts." *See* Diplomatic Note No. 13/2000 from the British Embassy in Washington, D.C. to the United States State Department, Feb. 2, 2000 at 1 (attached to the UK ART 57 Brief as Exhibit 1). The Diplomatic Note further stated: "The United Kingdom also views with great concern the potential application of the Matimak rationale to individual Overseas Territories residents, as well as to commercial enterprises." *Id.*

(Cont'd)
by this panel." 229 F.3d 187, 188 (2d Cir. 2000) (dissenting). As Judge Sotomayor pointed out, it is ironic that the nation that is offended by the ruling in *Matimak*, the United Kingdom, is "the very country the drafters of the alienage jurisdiction provision had in mind more than two hundred years ago when they sought to open the federal courts to foreign litigants." *Id.* at 189. The Founding Fathers, recognizing the importance of continued commerce with the United Kingdom, included the concept of alienage jurisdiction due to a fear that state courts would not enforce the debts of British creditors after the Revolutionary War. *See* Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 7-8 (1996).

It is clear that part of the concern about the *Matimak* decision by the United Kingdom comes from the belief that the United States is not providing comity in this instance. The Diplomatic Note states:

> The United Kingdom notes that all corporations validly incorporated under the laws of the United States and its territories are entitled to sue and be sued in the courts of the United Kingdom and its Overseas Territories. As a matter of international comity and reciprocity, the United Kingdom considers that United States Federal Courts should be open to corporations established in United Kingdom Overseas Territories.

See UK ART 57 Brief, at Exhibit l; *see also* UK ART 57 Brief, at 21 (noting that corporations incorporated under the political subdivisions of the United States such as Delaware, Puerto Rico and American Samoa are entitled to bring suit in the United Kingdom even though these political subdivisions are not recognized by the United Kingdom as sovereign states). Any extension of the *Matimak* decision to the British Virgin Islands places in further jeopardy the comity which is owed to the United Kingdom in this regard.

C. The Department of State Agrees That BVI Residents and Corporations are Subjects of the United Kingdom

The United States Department of State has also recognized the entanglement that has been created by the application of the *Matimak* decision and has actively asserted the position that residents and corporations from the United

Kingdom's Overseas Territories should be deemed subjects of the United Kingdom. *See* US ART 57 Brief.[10]

It is no wonder that the Department of State agrees with the United Kingdom. At the international level, it is undisputed that the United Kingdom is responsible for the British Virgin Islands. For example, the United Kingdom not only negotiates international treaties on behalf of the British Virgin Islands, but also executes them on behalf of the British Virgin Islands. *See, e.g.*, United Kingdom of Great Britain and Northern Ireland (on Behalf of the British Virgin Islands) and the United States of America: Exchange of Letter Constituting a Narcotics Cooperation Agreement with Respect to the British Virgin Islands, 1681 U.N.T.S. 451 (1987). Thus, the United States recognizes the United Kingdom as the Sovereign over the British Virgin Islands.

In addition, the terms of the Consular Convention between the United States and the United Kingdom provide the framework for consular relations between the two nations. Consular Convention, 3 U.S.T 3426, T.I.A.S. No. 2494 (1952). The Consular Convention clearly states that it applies "to all territories over which the United States has jurisdiction or international responsibility and to all British Territories." Treaties in Force as of Jan. 1, 1999 at 303 (1999); *see also*

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10. The State Department has also asserted its position in an amicus curiae brief that was submitted in *Matimak* (hereinafter "US Matimak Brief") and in an amicus curiae brief to the United States Court of Appeals in the matter captioned *Southern Cross Overseas Agencies, Inc. v. Wah Kwon Shipping Group Ltd.*, No. 98-5185 (decision reported at 181 F.3d 410 (3rd Cir. 1999)) (hereinafter "US Southern Cross Brief"). The *Southern Cross* court upheld jurisdiction.

Consular Convention, Art. 1, Sec. (2), 3 U.S.T. at 3427 ("Convention applies . . . on the part of his Majesty . . . to all His Majesty's colonies.") The Consular Convention also defines "nationals' of the United Kingdom as "all citizens of the United Kingdom and colonies . . . including, where the context permits, all judicial entities duly created under the law of any of those territories." Consular Convention, Art. 2, Sec. (4), 3 U.S.T. at 3428. Since the Consular Convention clearly shows that the United States government recognizes that the government of the United Kingdom is responsible for corporations created under the laws of the British Virgin Islands, the conclusion in *Matimak*, which is based on a contrary notion, is inconsistent with the position of the United States government, especially the executive branch. In this manner, the State Department's position that residents and corporations of the United Kingdom's Overseas Territories are subjects of the United Kingdom is clearly aligned with the dictates of the Consular Convention and is consistent with an attempt to avoid foreign policy difficulties with the United Kingdom. In such instances, when dealing with issues of foreign policy, the courts should give deference to the reasonable interpretation proffered by the Executive branch. *See Jones v. United States*, 137 U.S. 202, 212-14 (1890); *Regan v. Wald*, 468 U.S. 222, 242 (1984); *United States v. Diacolios*, 837 F.2d 79, 83-84 (2d Cir. 1988); *Tawain v. United States Dist. Court for the N. Dist. of Cal.*, 128 F.3d 712, 718-19 (9th Cir. 1997).

D. The Issue Presented Raises Serious Concerns for the Commercial World

It is undisputed that the Overseas Territories of the United Kingdom, like the British Virgin Islands, Bermuda, the Cayman Islands and the islands of Turks and Caicos are emerging financial centers.[11] As residents and corporations from these emerging markets contract with citizens of the United States, the *Matimak* decision clearly places uncertainty into these commercial relationships, especially in light of the fact that many of these contracts (like the Indenture in this case) call for a New York forum, including the possibility of suit in the United States District Courts in order to avoid any perceived prejudice a foreign party may encounter in state court.

Because of these emerging and increasing financial/economic relationships, the United Kingdom and the United States have taken a keen interest in the issue presented in *Matimak* and have asserted positions that are contrary to the

11. In the UK ART 57 Brief the United Kingdom stated that:

> By recent estimates, there were over 350,000 international business companies in the British Virgin Islands. There were 563 banks, 377 insurance companies, and 33,792 business companies incorporated in the Cayman Islands. In Bermuda there were 1,400 insurance companies and 6,824 business companies incorporated. In the Turks and Caicos Islands, 1911 insurance companies and 11,000 business companies were incorporated.

UK ART 57 Brief, at 20.

conclusion reached in *Matimak*. Both the United Kingdom and the United States have expended considerable efforts on this issue, indicating just how important it is to them. In fact, although the short nature of the briefing schedule for this supplemental submission prevented them from filing an official submission at this point, counsel for both the United Kingdom and the United States have indicated to Chase's counsel that they would seriously consider filing amicus briefs on this issue in this case, either on a rehearing en banc or on a petition for certiorari to the Supreme Court. Since this issue is of such importance to not only the parties, but also the governments of the United States and the United Kingdom, Chase respectfully submits that to the extent this Panel feels constrained by *Matimak*, it should refer the matter to be heard en banc.

However, in the first instance, Chase urges this Panel to follow the decision in *Peregrine Myanmar Ltd.* rather than extend *Matimak* to the British Virgin Islands. In cases like this, which involve considerable controversy,[12] there is no reason for this Panel to overrule a prior recent precedent.

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12. The critics of the *Matimak* decision have included: other courts (*see, e.g., Southern Cross Overseas Agencies, Inc. v. Wah Kwong, Shipping Group Ltd.*, 181 F.3d 410, 418 (3rd Cir. 1999)); judges within this circuit (*see, e.g., Koehler v. Bank of Bermuda (New York) Ltd.*, 229 F.3d 187 (2d Cir. 2000) (Judges Sotomayor, Leval and Calabresi dissenting); *Koehler v. Bank of Bermuda (New York) Ltd.*, 229 F.3d 424 (2d Cir. 2000) (Judges Cardamone and Newman stating that they "would rule that citizens of Bermuda and other British Dependent Territories are sufficiently subject to the sovereignty of the United Kingdom to satisfy the alienage clause of the diversity statute"); *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 88-92 (Cont'd)

CONCLUSION

For all of the foregoing reasons as well as those set forth in Chase's Brief filed with this Court on September 22, 2000, Chase respectfully requests that the Court affirm the judgment of the District Court and grant to Chase such other and further relief as is just.

Dated: December 18, 2000
New York, New York

(Cont'd)

(2d Cir. 1997) (Judge Altimari dissenting)); and commentators (*see, e.g.*, Frank Eric Marchetti, *Alienage Jurisdiction Over Stateless Corporations: Revealing the Folly of Matimak Trading Company v. Khalily*, 36 San Diego L. Rev. 249 (Winter 1999); Jennifer L. Coviello, *Access Denied: A Case Comment on Matimak Trading Co. v. Khalily*, 18 N.Y.L. Sch. J. Int'l & Comp. L. 435 (1999); Theresa M. Monzina, *Why is There Any Question? Hong Kong and Alienage Jurisdiction: A Critical Analysis of Matimak Trading Co. v. Khalily and D.A.Y.*, 10 Pace Int'l L.Rev. 575 (Fall 1998)). Likewise, The Fourth and Seventh Circuits, either prior to *Matimak* or without discussing *Matimak*, have held that citizens of the United Kingdom's Overseas Territories are subjects of a foreign state for purposes of alienage jurisdiction. *Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-43 (7th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991).

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[EXHIBITS TO SUPPLEMENTAL BRIEF FOR PLAINTIFF-APPELLEE ARE BEING SUBMITTED SEPARATELY AS A LODGING]

Supreme Court, U.S.
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No. 01-651

IN THE

Supreme Court of the United States

THE CHASE MANHATTAN BANK, as Indenture Trustee, under the Indenture, dated as of May 6, 1998,

Petitioner,

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether corporations organized under the laws of the British Virgin Islands and other United Kingdom overseas territories are "citizens or subjects of a foreign state" for the purposes of alienage jurisdiction under 28 U.S.C. § 1332(a)(2)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Petitioner The JPMorgan Chase Bank, formerly known as The Chase Manhattan Bank, states that it is wholly-owned by J.P. Morgan Chase & Co., a publicly-owned company.

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OPINIONS BELOW

The Per Curiam Opinion of the United States Court of Appeals for the Second Circuit in *The Chase Manhattan Bank, as Indenture Trustee, under the Indenture, dated as of May 6, 1998 v. Traffic Stream (BVI) Infrastructure Limited* is reported at 251 F.3d 334 (2d Cir. 2001) (Cert. App. 1a-7a).[1]

The Memorandum Opinion and Order of the United States District Court for the Southern District of New York in *The Chase Manhattan Bank, as Indenture Trustee, under the Indenture, dated as of May 6, 1998 v. Traffic Stream (BVI) Infrastructure Limited* is reported at 2000 WL 573232 (S.D.N.Y. May 8, 2000) (Cert. App. 8a-14a).

The Opinion and Order of the United States District Court for the Southern District of New York in *The Chase Manhattan Bank, as Indenture Trustee, under the Indenture, dated as of May 6, 1998 v. Traffic Stream (BVI) Infrastructure Limited* is reported at 86 F. Supp. 2d 244 (S.D.N.Y. 2000) (Cert. App. 15a-54a).

BASIS FOR JURISDICTION

The United States Court of Appeals for the Second Circuit reversed the final judgment of the District Court for the Southern District of New York on May 24, 2001 (Cert. App. 1a-7a). On July 24, 2001, the United States Court of Appeals for the Second Circuit denied The JPMorgan Chase Bank's timely-filed petition for rehearing *en banc* (Cert. App.

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1. References hereinafter to "Cert. App. __" are to pages in the Appendix attached to the Petition for Writ of Certiorari.

55a-56a). The petition for a writ of certiorari was filed within 90 days from the date of the denial of the petition for rehearing *en banc* on October 18, 2001. 28 U.S.C. § 2101(c); SUP. CT. R. 13.3. Certiorari was granted on January 4, 2002.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1332(a):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of

> $75,000, exclusive of interest and costs, and is between —
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
>
> For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

STATEMENT OF THE CASE

In May 1998, Traffic Stream (BVI) Infrastructure Limited ("Traffic Stream"), a corporation organized under the laws of the British Virgin Islands (JA 8a, 40a),[2] raised $119,000,000 in the United States debt markets by entering into an Indenture, pursuant to which Traffic Stream issued its 14¼% Senior Secured Notes due 2006, to holders of the Notes. The JPMorgan Chase Bank ("Chase"), a corporation existing under and by the laws of the State of New York and

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2. References hereinafter to "JA __" are to pages in the Joint Appendix filed with the Supreme Court.

authorized to exercise trust powers, entered into the Indenture with Traffic Stream and agreed to serve as Trustee. (JA 8a). The Indenture states that "[Traffic Stream] irrevocably submits to the jurisdiction of any court of the State of New York or any United States federal court sitting in the Borough of Manhattan, New York City, New York, United States. . . ." (JA 85a).

Beginning in January 1999, Traffic Stream committed multiple "Events of Default", as defined in the Indenture, including the failure to pay the semi-annual interest payment due in May 1999. (JA 16a-20a). Chase commenced this action on June 4, 1999, in the United States District Court for the Southern District of New York, seeking, among other things, a turnover of certain funds in New York that were held as security by Chase, as Trustee, and a deficiency judgment. (JA 23a). Subject matter jurisdiction was based upon the alienage provisions of 28 U.S.C. § 1332. (JA 7a, ¶ 1). Traffic Stream, in its amended answer, admitted jurisdiction (JA 251a, ¶ 1) and admitted the Events of Default (JA 255a-256a, ¶¶ 22-31) but asserted that its obligation to pay any amount under the Indenture was excused based on the impossibility defense (JA 259a-261a, ¶¶ 53-64). Chase moved for summary judgment. (2d Cir. App. 196-242).[3]

Summary judgment was granted by the district court in an opinion and order dated January 31, 2000. *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 86 F. Supp. 2d 244 (S.D.N.Y. 2000) (Hon. Shira Scheindlin) (Cert. App. 15a-54a). The district court ordered Chase to foreclose on the collateral accounts, which exceeded

3. References hereinafter to "2d Cir. App. __" are to pages in the Joint Appendix which was filed in the Second Circuit Court of Appeals.

forty-seven million dollars, before submitting its proposed deficiency judgment. *Id.* at 262. The district court issued a second opinion on May 8, 2000, in order to resolve certain disputes about the appropriate deficiency judgment. *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, No. 99 Civ. 4056 (SAS), 2000 WL 573232 (S.D.N.Y. May 8, 2000) (Cert. App. 8a-14a).

Traffic Stream appealed to the Second Circuit, raising only the issues regarding the impossibility defense in its brief. At the oral argument before the Second Circuit on December 1, 2000, the panel raised *sua sponte* the issue of whether subject matter jurisdiction existed under 28 U.S.C. § 1332(a)(2) in light of the fact that the defendant Traffic Stream was incorporated in an United Kingdom Overseas Territory, namely the British Virgin Islands. The panel referred the parties to three recent cases in which the Second Circuit had found that residents and corporations from other United Kingdom Overseas Territories, namely Hong Kong (prior to its transfer to the People's Republic of China) and Bermuda, were not "citizens or subjects of a foreign state" for purposes of alienage jurisdiction.[4]

After the parties submitted supplemental briefing on this issue (JA 256a-269a, 277a-298a and Lodging), the Second Circuit, on May 24, 2001, held that there was no alienage jurisdiction for residents or corporations from the British Virgin Islands because such residents or entities were

4. The three cases were: *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998); *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *amended by* 229 F.3d 424 (2d Cir.), *reh'g en banc denied*, 229 F.3d 187 (2d Cir. 2000); and *Universal Reinsurance Co., Ltd. v. St. Paul Fire & Marine Insurance Co.*, 224 F.3d 139 (2d Cir. 2000).

"stateless" due to the fact that the United States does not regard the British Virgin Islands as an independent, sovereign political entity. (Cert. App. 1a-7a). The Second Circuit rejected the argument that the residents and corporations from the British Virgin Islands were citizens or subjects of the United Kingdom. The Second Circuit did not address materials that were submitted by Chase which demonstrated the United Kingdom's and the United States Department of State's positions that the residents and corporations from the United Kingdom Overseas Territories are citizens or subjects of the United Kingdom, and should be recognized as such for purposes of alienage jurisdiction. The Second Circuit also did not address the overruling of its 1996 decision in *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 45 n.4 (2d Cir. 1996), which had upheld alienage jurisdiction in a case involving a resident of the British Virgin Islands.

On June 7, 2001, Chase filed a petition for rehearing *en banc* with the Second Circuit. This petition was denied on July 24, 2001. (JA 6a, Cert. App. 55a-56a). Chase duly filed its petition for a writ of certiorari on October 18, 2001. On January 4, 2002, this Court granted a writ of certiorari.

SUMMARY OF ARGUMENT

The Framers of the Constitution ("Framers") included provisions for alienage jurisdiction of federal courts in Article III of the Constitution and the original Judiciary Act of 1789 because of concern over issues of foreign policy and international trade.[5] In determining that foreign litigants

5. Alienage jurisdiction is distinct from ordinary diversity jurisdiction because alienage jurisdiction implicates issues of foreign relationships and international trade. *See* Kevin R. Johnson, *Why* (Cont'd)

should be entitled to bring suit in a neutral federal forum, the Framers had two overarching concerns: first, the prevention of foreign policy entanglements with foreign nations whose citizens believed themselves to have been unfairly treated by a biased state court; and, second, the promotion of foreign investment and trade in the fledgling republic. Over two hundred years later, these concerns are still valid, and indeed, for the past two centuries, the law surrounding alienage jurisdiction was uncontroversial.

This changed in 1997 when a divided panel of the Court of Appeals for the Second Circuit in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998), held that residents and corporations from Hong Kong, then an United Kingdom Overseas Territory,[6] were

(Cont'd)
Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens, 21 Yale J. Int'l L. 1, 4 (1996) ("alienage jurisdiction differs in salient respects from ordinary diversity jurisdiction"). Thus, even those who advocate the withdrawal of ordinary diversity jurisdiction have recognized the necessity of alienage jurisdiction. *See, e.g.*, Henry Friendly, *Federal Jurisdiction: A General View* 149-50 (1973); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 Harv. L. Rev. 963, 966-68 (1979).

6. The United Kingdom Overseas Territories were formerly referred to as the British Dependent Territories. The United Kingdom Overseas Territories presently include Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the Sovereign Base Areas in Cyprus, the Falkland Islands, Gibraltar, Montserrat, the Pitcairn Islands, Saint Helena and dependencies, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands. *See* Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner, dated November 21, 2001, at 2 n.2.

"stateless", and, thus, not subject to alienage jurisdiction under 28 U.S.C. § 1332(a)(2). In making its ruling, the Second Circuit sought to determine whether, under the law of the United Kingdom, a resident corporation from Hong Kong was a citizen or subject of the United Kingdom. Focusing on only two British statutes (the British Companies Act 1948 and the British Nationality Act 1981), the *Matimak* court concluded that a Hong Kong corporation was not a citizen or subject of the United Kingdom, and, thus, was stateless because Hong Kong was not recognized as a sovereign state by the United States. The *Matimak* decision was severely criticized.[7] However, in spring 2000, the Second Circuit extended *Matimak* when it dismissed claims in two cases involving Bermuda corporations and Bermuda individuals, citing *Matimak* as controlling authority. *See Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *amended by* 229 F.3d 424 (2d Cir.), *reh'g en banc denied*, 229 F.3d 187 (2d Cir. 2000); *Universal Reinsurance Co., Ltd. v. St. Paul Fire & Marine Insurance Co.*, 224 F.3d 139 (2d Cir. 2000). This case follows.

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7. *See, e.g.*, Jonathan Shafter, *Original Intentions and International Reality: States, Sovereignty, and the Misinterpretation of Alienage Jurisdiction in Matimak v. Khalily*, 39 Colum. J. Transnat'l L. 729 (2001); Frank Eric Marchetti, *Alienage Jurisdiction Over Stateless Corporations: Revealing the Folly of Matimak Trading Company v. Khalily*, 36 San Diego L. Rev. 249 (1999); Jennifer L. Coviello, *Access Denied: A Case Comment on Matimak Trading Co. v. Khalily*, 18 N.Y.L. Sch. J. Int'l & Comp. L. 435 (1999); Mark Baker, *Lost in the Judicial Wilderness: The Stateless Corporation after Matimak Trading*, 19 Nw. J. Int'l L. & Bus. 130 (1998); Teresa M. Mozina, *Why Is There Any Question? Hong Kong and Alienage Jurisdiction: A Critical Analysis of Matimak Trading Co. v. Khalily and D.A.Y.*, 10 Pace Int'l L. Rev. 575 (1998).

As the United Kingdom clearly demonstrates in its *amicus* brief, the *Matimak* court, which did not have the benefit of any briefing by the United Kingdom, misinterpreted that country's law and therefore erred in its holding that there was no legal relationship between the United Kingdom and the residents and corporations of its overseas territories. In extending the *Matimak* decision to residents and corporations of the British Virgin Islands, the Second Circuit ignored the numerous indicia which demonstrate that residents and corporations of those islands are indeed under the sovereignty of the United Kingdom. In doing so, the Second Circuit refused to extend any deference to the position of the Executive Branch which recognizes that the United Kingdom exercises sovereignty over the British Virgin Islands.

The *Matimak* decision, in its implementation, violates the Framers' intent. It creates a clear entanglement with the United States' closest ally, the United Kingdom, which has issued two Diplomatic Notes protesting the Second Circuit's decisions. The failure to provide comity and deference to the United Kingdom's own determination of its subjects has caused difficulties for the United States government. The failure by the judicial branch of the United States government to defer to the Department of State in a matter involving recognition of the United Kingdom's sovereignty over the British Virgin Islands is equally troubling. Finally, the *Matimak* line of cases adversely impacts international trade with residents and corporations from United Kingdom Overseas Territories, many of which have become centers for substantial capital markets and other financial transactions involving literally billions of U.S. dollars. The Second Circuit's decision has a profound impact on thousands of British Virgin Islands companies which have incorporated

under the International Business Companies Act to transact business exclusively outside the British Virgin Islands and have raised capital in the capital markets of the United States, as well as on such companies' creditors. Under all these circumstances, the decision of the Second Circuit should be reversed and alienage jurisdiction upheld.

ARGUMENT

I.

THE HISTORICAL BASIS FOR ALIENAGE JURISDICTION AND THE FRAMERS' INTENT TO ENSURE ALIENS ACCESS TO THE FEDERAL COURTS CONFIRM THE PROPRIETY OF ALIENAGE JURISDICTION IN THIS CASE

Matimak (and the subsequent extension of *Matimak* to this case) vitiates the very reasons the Framers made specific provision for alienage jurisdiction in the Constitution and the original Judiciary Act of 1789. After the Revolutionary War and prior to the adoption of the Constitution, the state courts, fueled by a mixture of anti-British and anti-creditor sentiment, made it difficult for British creditors to collect debts from local debtors. *See* Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 6 (1996). Alienage jurisdiction was seen as a means of addressing this problem by providing foreign litigants with a neutral federal forum. *See id.* Thus, the Constitution specifically provided that "[t]he judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2. The writings of the Framers demonstrate that two predominant reasons were the basis for alienage jurisdiction.

The first of these reasons was to prevent entanglements with foreign governments that became aggrieved when their citizens were unfairly treated by a less-than-neutral state court either as plaintiff or defendant.[8] Alexander Hamilton set forth this concern in *The Federalist No. 80*:

> [T]he peace of the WHOLE ought not be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquility. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the

8. This was especially fitting for the young republic, which found that the state courts' refusal to allow private British creditors to collect on their debts made it difficult for the new nation to meet its obligations under the Treaty of Paris of 1783. *See* Johnson, *supra*, at 8; Marchetti, *supra*, at 255.

> stipulations in a treaty or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the cases in which foreigners are parties involve national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

The Federalist No. 80, at 476-77 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This foreign relations aspect of alienage jurisdiction is set forth not only in *The Federalist*, but also in the writings of several of the other Framers.

> [T]here is a particular & very cogent reason for securing to *foreigners* a trial . . . in a *federal* court. With respect to *foreigners*, all the states form but *one nation*. This *nation* is responsible for the conduct of all its members towards foreign nations, their citizens & subjects; and therefore ought to possess the power of doing justice to the latter. Without this power, a single state, or one of its citizens, might embroil the whole union in a foreign war.

Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 14 *The Documentary History of the Ratification of the Constitution* 204 (1983).[9]

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9. *See also* 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 158-59 (Jonathan Elliot ed., 1888) (Comments of William Davie of North Carolina); 3 *id.* at 533-34 (Comments of James Madison of Virginia); 2 *id.* at 492-93 (Comments of James Wilson of Pennsylvania).

The second of the major purposes behind alienage jurisdiction was to promote foreign investment in and trade with the fledgling republic. The Framers recognized that the ill treatment of foreigners who sued or were sued in the state courts could discourage foreign investment. James Madison, in particular, noted this aspect of the need for alienage jurisdiction: "We well know, sir, that foreigners cannot get justice done them in [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us." 3 Elliot, *supra*, at 583. Such a concern was a clear priority as the United States, at that time, was in an economic crisis largely due to a monetary shortage. E.A.J. Johnson, *The Foundations of American Economic Freedom: Government and Enterprise in the Age of Washington* 123 (1973); Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 Okla. City U. L. Rev. 547, 558 (1989) ("[T]he new nation teetered on the brink of economic disaster."); *see also* Jonathan Shafter, *Original Intentions and International Reality: States, Sovereignty, and the Misinterpretation of Alienage Jurisdiction in Matimak v. Khalily*, 39 Colum. J. Transnat'l L. 729, 745-47 (2001) (asserting that the economic reasons for alienage jurisdiction were as important to the Framers as the foreign policy reasons).

Moreover, Congress codified this grant of alienage jurisdiction in Section 11 of the Judiciary Act of 1789, which provided for federal court jurisdiction in cases in which "an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Apparently the Framers of the Constitution and drafters of this first Judiciary Act used the terms foreigners and aliens interchangeably when referring to non-United States citizens or subjects. *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 416 (3d Cir. 1999).

In 1875, Congress amended the alienage jurisdiction provisions by replacing the term "alien" with the current "citizens or subjects" language. This change, however, was not made in order to narrow the meaning of "alien", but rather was intended to have the statute mirror the Constitution in order to make it clear that the federal courts did not have jurisdiction over disputes between aliens. *See* Johnson, *supra*, at 21. "[T]he drafters of the Constitution chose the words 'citizens' or 'subjects' to refer to the broad category of those under the authority of a foreign power." *Koehler*, 229 F.3d at 191 (Sotomayor, J., dissenting) (citing *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.)).

As set forth hereafter at Point III, the Second Circuit's holding in this case, that the residents and corporations from the British Virgin Islands are "stateless" and unable to participate in a federal forum under the alienage jurisdiction provisions, completely undercuts the express intent of the Framers to prevent foreign entanglements and to promote trade. By narrowing the scope of the terms "citizens" and "subjects", the Second Circuit also contradicts the Framers' intention and understanding that alienage jurisdiction broadly encompassed all those who were under the authority of a foreign power. In doing so, the Second Circuit has declared literally millions of individuals and corporations around the world to be "stateless", a situation which would have been incomprehensible to the Framers.

II.

THE MATIMAK DECISION IS BASED ON AN INCORRECT INTERPRETATION OF THE LAW OF THE UNITED STATES AND THE UNITED KINGDOM AND SHOULD BE REVERSED

In 1997, after two centuries of alienage jurisprudence,[10] a divided panel of the Court of Appeals for the Second Circuit in *Matimak Trading Co. v. Khalily* held in a case involving a Hong Kong corporation that residents and corporations from the United Kingdom Overseas Territories were "stateless", and, thus, not subject to alienage jurisdiction under 28 U.S.C. § 1332(a)(2). 118 F.3d at 88. Judge Altimari, in a strongly worded dissent, concluded that Hong Kong, like the other United Kingdom Overseas Territories, was "inexorably linked" to the United Kingdom and, thus, its residents should

10. The Second Circuit, in *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 45 n.4 (2d Cir. 1996), upheld jurisdiction in an action between a New York corporation and a British Virgin Islands corporation. The sudden change in *Matimak*, just a year later, was not precipitated by a change in the Judiciary Act or the legal status of United Kingdom Overseas Territory residents by the United Kingdom. Instead, this change was simply a change in interpretation — an interpretation with which all other circuits deciding this issue have disagreed (*see, e.g., Southern Cross Overseas Agencies*, 181 F.3d at 417-19; *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-43 (7th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998)), and indeed many members of the Second Circuit judiciary disagree (*see, e.g., Matimak*, 118 F.3d at 89 (Altimari, J. dissenting); *Koehler*, 229 F.3d at 187 (Judges Sotomayor, Leval and Calabresi dissenting); *Koehler*, 229 F.3d at 424-25 (Judges Cardamone and Newman stating that were the question open, they "would rule that citizens of Bermuda and other British Dependant territories are sufficiently subject to the sovereignty of the United Kingdom to satisfy the alienage clause").

be considered "citizens or subjects" of the United Kingdom for alienage jurisdiction purposes. *Id.* at 91-92.

Underlying the majority decision in *Matimak* was a willingness to broadly apply the concept of "statelessness" to foreign corporations, which was not well supported in the law. While asserting that the "notion of statelessness is now well embedded in international law", the *Matimak* court then cited to six cases that only raised "statelessness" issues for individuals. *Id.* at 86, 87. None of these cases involved corporations.[11] The reason for this is simple: as Judge Altimari wrote in his dissent, "[a] stateless corporation is an oxymoron." *Id.* at 89. The majority in *Matimak* failed to acknowledge that corporations are creations of law and, accordingly, failed to correctly analyze the indicia that pertain to a corporation. As Judge Sotomayer noted in her dissent in *Koehler*, "In such cases, when our Department of State determines that a country is not a sovereign state, the more

11. *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1089-90 (9th Cir. 1983) (involving individual who had his Soviet Union citizenship revoked); *Sadat v. Mertes*, 615 F.2d 1176, 1178-1181 (7th Cir. 1980) (holding a United States naturalized citizen who claimed dual citizenship and who was living abroad at the time of the suit could not invoke alienage jurisdiction); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974) (in an Eleventh Amendment case, court noted that members of Native American tribes are not state citizens because of the Federal Indian Law of 1972); *Shoemaker v. Malaxa*, 241 F.2d 129, 129 (2d Cir. 1957) (involving individual who had his Romanian citizenship revoked); *Ligi v. Regnery Gateway, Inc.*, 689 F. Supp. 159, 161-62 (E.D.N.Y. 1988) (involving issue of whether Romanian individual properly revoked his citizenship, jurisdiction upheld); *RCA Records v. Hanks*, 548 F. Supp. 979, 982 (S.D.N.Y. 1982) (involving issue of whether individual from the Netherlands had revoked his citizenship, jurisdiction upheld).

reasonable conclusion is not that its corporations are "stateless," but rather that they are subject to some other sovereign." 229 F.3d at 193. By extending "statelessness" concepts for individuals to corporations, the *Matimak* court's reasoning was flawed from the outset.

The Second Circuit's analysis in *Matimak* began with the principle that the term "foreign state" in 28 U.S.C. § 1332(a)(2) refers only to nations formally recognized by the executive branch. *Matimak*, 118 F.3d at 79. Since Hong Kong was a British Overseas Territory that was not recognized by the Executive Branch as a "foreign state" unto itself, the Second Circuit concluded that alienage jurisdiction could not be invoked by a "citizen or subject" of Hong Kong.[12] *Id.* at 82-83. The Second Circuit then analyzed whether a corporation or resident of Hong Kong was a "citizen or subject" of the United Kingdom. After first stating that "[w]e begin with the truism that a foreign state is entitled to define who are its citizens and subjects", the *Matimak* court then tried to determine whether the United Kingdom considered residents and corporations from its territories as citizens. *Id.* at 85. Looking at two British statutes, the British Companies Act 1948 and the British Nationality Act 1981, the *Matimak* court concluded that residents and corporations from the United Kingdom's Overseas Territories were not citizens or subjects of the United Kingdom, and, thus, were stateless. *Id.* at 85-86. As the United Kingdom has authoritatively pointed out in its subsequent filings and in the

12. The *Matimak* case concerned a citizen of Hong Kong, which in 1996 was an United Kingdom Overseas Territory. In a case brought in 1999, after Hong Kong became a Special Administrative Region of the People's Republic of China (the "PRC"), the district court held that a Hong Kong citizen could now sue or be sued in federal court as a citizen of the PRC. *Favour Mind Ltd. v. Pacific Shores, Inc.*, No. 98 Civ. 7038(SAS), 1999 WL 1115217 at *6-7 (S.D.N.Y. Dec. 7, 1999).

brief it is filing on this appeal, the *Matimak* court misinterpreted the law of the United Kingdom and improperly applied the British Companies Act 1948 and the British Nationality Act 1981. (*See* L 16-19).[13] Equally important, however, the court failed to recognize that the United States had repeatedly recognized the United Kingdom as having sovereignty over its Overseas Territories. By failing to look first to the position of the United States and the Department of State before attempting an analysis of United Kingdom law, the court was led into error which was compounded by its misreading of United Kingdom law.

The *Matimak* court regarded a company incorporated under the British Companies Act 1948 (which the *Matimak* court failed to recognize was replaced by the Companies Act 1985) as the paradigm British company for purposes of alienage jurisdiction. Such an interpretation, however, is wrong. The Companies Act that the *Matimak* court focused on only covered certain law districts of the United Kingdom. The United Kingdom, as an international entity, is composed of multiple law districts. These districts, most of which have their own Companies legislation, not only include England, Wales and Scotland (the areas for which the Companies Act 1985 applies), but also Northern Ireland, each of the Overseas Territories and each of the Crown Dependencies.[14]

13. References hereinafter to "L __" are to pages in the Lodging filed with the Supreme Court.

14. The United Kingdom has explained the concept of law districts:

> The United Kingdom consists of a number of law districts for the purpose of conflict of laws. The metropolitan

(Cont'd)

(L 12, 17-18). The *Matimak* court improperly elevated the companies legislation of one law district over that of another, rather as if a foreign court were to find a corporation could only properly be called a United States corporation if it were incorporated in Delaware and not in another state. Under the *Matimak* court's reasoning, companies from Northern Ireland would also be "stateless" because they are not formed under the British Companies Act 1948 (now 1985) but rather under the company law of Northern Ireland in the Companies (Northern Ireland) Order 1986, No. 1032, ch. 6 (N. Ir.). Of course, such a result is clearly contrary to the United Kingdom's exercise of sovereignty over such companies. The *Matimak* court's reliance on the British Companies Act 1948 was, thus, erroneous and misplaced.

Equally misplaced was the *Matimak* court's reliance on the British Nationality Act 1981. Although the *Matimak* court recognized that this act "applies only to natural persons, not corporations", it went on to hold that the Nationality Act "distinguishes between citizens of the United Kingdom and

(Cont'd)

> United Kingdom consists of three separate law districts: England and Wales, Scotland, and Northern Ireland. The Overseas Territories and Crown Dependencies are each separate law districts. As such, they are entitled to enact their own laws in accordance with their constitutions. These separate law districts have separate laws, but they all belong to one State: the United Kingdom. It follows that, in international law, the United Kingdom Overseas Territories are not independent States, but are parts of the United Kingdom, and are subject to United Kingdom sovereignty.

(L 12).

citizens of 'British Dependant Territories'." *Matimak*, 118 F.3d at 86. As the United Kingdom has repeatedly pointed out, such a conclusion is wrong. (L 18).

The United Kingdom recognizes six categories of nationality under the British Nationality Act 1981. However, every one of those categories is entitled to the protection of the United Kingdom in the international forum. *See* United Kingdom Government's Diplomatic Service Procedure Manual, Vol. 7, Annex 1, § 2 (Mar. 1996) [hereinafter "United Kingdom Diplomatic Service Procedure Manual"] (located at L 31). There is no such category as "citizen of the United Kingdom", and the *Matimak* court's reference to such is simply wrong. For purposes of consular protection and international claims, the United Kingdom has defined the term "United Kingdom national," which includes the citizens of the United Kingdom Overseas Territories. *Id.*

The fact that one category of nationality provides the right to live in the "metropolitan United Kingdom" (England, Wales, Scotland and Northern Ireland) or in an Overseas Territory while another does not is a matter of United Kingdom immigration policy. Alienage jurisdiction should not turn on categorization or terminology adopted and amended by the United Kingdom. Instead, the *Matimak* court should have looked to the plethora of indicia that show that residents and corporations from the United Kingdom Overseas Territories are under the sovereignty and protection of the United Kingdom, and, thus, should be considered "citizens or subjects" for alienage jurisdiction purposes.[15]

15. The Court is respectfully referred to the *amicus curiae* brief of the Government of the United Kingdom of Great Britain and Northern Ireland filed herein for a complete and authoritative discussion of these indicia.

There is vast evidence that the United Kingdom is internationally responsible for the residents and corporations from its overseas territories and that such residents and corporations are subject to United Kingdom sovereignty. For example, under the United Kingdom Government's Diplomatic Service Procedure Manual, the term "United Kingdom national" is defined to include "British Dependent Territories Citizens" and "[c]ompanies incorporated under the law of the United Kingdom or of any territory for which the United Kingdom is internationally responsible." United Kingdom Diplomatic Service Procedure Manual, *supra*, § 2, Rule 1(a)(2) and 1(b) (located at L 31). Further, in the Consular Convention between the United States and the United Kingdom, the term "nationals", as it regards the United Kingdom, is defined to include "all juridical entities duly created under the law of any of [the Overseas T]erritories." Consular Convention between United States and the United Kingdom, June 6, 1951, at Art. 2, § 4(a), 3 U.S.T. 3426.

The fact that the United Kingdom considers the residents and corporations from its territories as its "nationals" (and that the United States recognizes such in the Consular Convention) should be no surprise when one considers the relationship between the British Virgin Islands and United Kingdom. The Constitution of the British Virgin Islands recognizes that the United Kingdom continues to have sovereignty over that Overseas Territory. *See* Virgin Islands (Constitution) Order 1976, No. 2145, § 71 [hereinafter "BVI Const."] ("There is reserved to Her Majesty full power to make laws for the peace, order and good government of the Virgin Islands.").[16] The Governor of

16. The British Virgin Islands (Constitution) Order 1976 is reprinted in *Constitutions of Dependencies and Special Sovereignties* (Blaustein ed., 1997).

the British Virgin Islands, who is appointed by the Queen, is responsible for core government functions including internal security, public service and court administration. (L 20; *see also* BVI Const., *supra*, §§ 3-6, 19). Similarly, any bill passed by the Legislative Council of the British Virgin Islands must be approved by the Governor and the Queen, with such procedure including a careful review by the United Kingdom's Foreign and Commonwealth Office.[17] (L 20-21; *see also* BVI Const., *supra*, § 42). In fact, the members of the Legislative Council must swear or affirm their allegiance to the Crown prior to taking part in any of the Council's proceedings. BVI Const., *supra*, § 36.

In the area of law, the final appeal from the courts of the British Virgin Islands is to the Judicial Committee of the Privy Council, which is comprised of members of the House of Lords and senior judges of the United Kingdom and the Commonwealth. Virgin Islands (Appeals to Privy Council Order) 1967 (S.I. 1967 No. 234), *as amended by* the Anguilla, Montserrat, and Virgin Islands (Supreme Court) Order 1983 (S.I. 1983 No. 1108), Article 3; *see also Privy Council Office: Judicial Committee*, *at* http://www.privy-council.org.uk/judicialcommittee/index.htm (last visited Feb. 14, 2002). In addition, barristers who are called to the English, Scottish and Northern Ireland Bar, as well as solicitors, may practice law in the British Virgin Islands provided that they submit proof of their training and pay a fee. *See* West Indies

17. The oversight of the laws passed by the Legislative Council of the British Virgin Islands is not unique among the United Kingdom Overseas Territories. Judge Sotomayor, in her dissent from the denial of a rehearing *en banc* in the *Koehler* case, stated: "All authority to make laws for the 'peace, order, welfare and good government' of Bermuda is granted to the Bermuda legislature solely by the United Kingdom, which regulates Bermuda lawmaking." 229 F.3d at 192.

Associated States Supreme Court Act, Chapter 80, § 68 of the laws of the British Virgin Islands.

It is also clear that the United Kingdom controls the foreign policy of the Overseas Territories. The United Kingdom not only provides for the Overseas Territories' military defense, but also acts on their behalf in regards to foreign diplomatic relations.[18] In addition, the United Kingdom not only negotiates international treaties on behalf of the British Virgin Islands, but also executes them on behalf of the British Virgin Islands.[19] *See, e.g.*, United Kingdom of Great Britain and Northern Ireland (on Behalf of the British Virgin Islands) and the United States of America: Exchange of Letters Constituting a Narcotics Cooperation Agreement with Respect to the British Virgin Islands, April 14, 1987, 1681 U.N.T.S. 28491.

The British Virgin Islands are similarly bound by treaties to which the United Kingdom is a party and which the United Kingdom has extended to the British Virgin Islands. For example, the United Kingdom recently exercised its sovereign authority over the Overseas Territories when the

18. *See, e.g.*, Central Intelligence Agency, *The World Factbook: British Virgin Islands* (2001), *available at* http:/www.cia.gov/cia/publications/factbook/geos/vi.html (listing Diplomatic Representation as "none (overseas territory of UK)" and Military as "defense is the responsibility of the UK").

19. The oversight of foreign policy interests of the British Virgin Islands is not unique among the United Kingdom Overseas Territories. In *Wilson v. Humphrey's (Cayman) Limited* the Seventh Circuit, in holding that alienage jurisdiction applied to a company from the Cayman Islands, stated that "[t]he United Kingdom represents Caymanian diplomatic interests and is responsible for its military defense." 916 F.2d at 1242.

Queen in Council overrode local legislatures and amended the laws of certain United Kingdom Overseas Territories (including the British Virgin Islands) to fulfill the United Kingdom's obligations under the European Convention on Human Rights and the United Nations International Covenant on Civil and Political Rights. Associated Press, *The British Government Decriminalizes Homosexuality in Caribbean Territories* (January 5, 2001).

The British Virgin Islands has stated that its citizens and corporations are subject to the sovereignty of the United Kingdom. The Attorney General for the British Virgin Islands, Cherno S. Jallow, issued a statement, dated February 3, 2000, that fully supports the conclusion that residents and corporations of the British Virgin Islands are subjects of the United Kingdom. (*See* L 35-36 ("On behalf of the Government of the British Virgin Islands, I fully support the arguments and conclusions presented in the Brief of the United Kingdom.")). In this instance, where the three relevant entities (the United Kingdom, the British Virgin Islands and the United States) all have opined that the residents of the British Virgin Islands are subjects of the United Kingdom, there can be no reasoned argument which would allow a court to reach a different conclusion. *See Favour Mind Ltd.*, 1999 WL 1115217 at *6-7 & n.12 (holding that corporations from post-reversion Hong Kong were subjects of the PRC based on the uniform positions of the PRC, Hong Kong Special Administrative Region and the United States). As the Third Circuit wrote in upholding alienage jurisdiction over a Hong Kong corporation post-*Matimak*, "[w]e do not believe that executive authority in foreign policy matters is limited to the definition of "foreign state" for § 1332 purposes. Executive competence also extends to the definition of "citizens or subjects," at a minimum in cases where the proper interpretation is unclear and the outcome may affect our foreign policy." *Southern Cross Overseas Agencies*, 181 F.3d at 418.

III.

THE NEGATIVE EFFECTS OF MATIMAK ARE CLEAR AND MANDATE REVERSAL IN THIS CASE

A. The Matimak Line of Cases Has Led to a Foreign Entanglement with the United Kingdom and Could Cause Entanglements With Other Allies

The Second Circuit's opinion in *Matimak* and its extension to other cases involving other residents and corporations from the United Kingdom Overseas Territories[20]

20. The courts of the Second Circuit have extended *Matimak* to other United Kingdom Overseas Territories on at least nine occasions including this one. *See, e.g.*, *Koehler*, 209 F.3d at 139 (dismissing action against Bermuda defendants); *Universal Reinsurance Co., Ltd.*, 224 F.3d at 141 (holding there would be no alienage jurisdiction for a domiciliary of Bermuda); *General Star Indem. Co. v. Platinum Indem. Ltd. Bank of Am.*, No. 00 Civ. 4960(LMM), 2001 WL 40763 at *1-2 (S.D.N.Y. Jan. 17, 2001) (holding that there was no subject matter jurisdiction because the defendant is a Bermuda corporation); *New Heaven Properties Ltd. v. Grinberg*, No. 99 Civ. 11546 (LMM), 2000 WL 64842 at *1-3 (S.D.N.Y. Jan. 26, 2000) (dismissing a British Virgin Islands corporation's complaint); *III Fin. Ltd. v. Aegis Consumer Funding Group, Inc.*, No. 99 Civ. 2579(DC), 1999 WL 1080371 at *3-4 (S.D.N.Y. Nov. 30, 1999) (granting defendant's motion to dismiss because the plaintiff was a Cayman Islands corporation); *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 Civ. 6124(JGK), 1999 WL 307666 at *3-4 (S.D.N.Y. May 17, 1999) (dismissing action against a Cayman Islands defendant), *aff'd*, 199 F.3d 94 (2d Cir. 1999); *Lucky Yeh Int'l, Ltd. v. Happiness Express, Inc.*, No. 96 Civ. 3365(SJ), 1999 WL 147095 at *3 (E.D.N.Y. March 12, 1999) (dismissing Hong Kong corporation's complaint); *Klein v. Marriott Int'l., Inc.*, 34 F. Supp. 2d 176, 178-80 (S.D.N.Y. 1999) (dismissing complaint against Bermuda defendant).

has created an entanglement with one of the United States' greatest allies, the United Kingdom. The irony of this situation was not lost on Judge Sotomayor in her dissent from the Second Circuit's refusal to consider the *Matimak* issue *en banc*:

> Paradoxically, the country we offend by these holdings is not only a strong ally, but the very country the drafters of the alienage jurisdiction provision had in mind more than two hundred years ago when they sought to open the federal courts to foreign litigants.

Koehler, 229 F.3d at 188-89 (Sotomayor, J., dissenting). Indeed, the United States appears as *amicus curiae* in this matter because of the seriousness of the issues raised by the *Matimak* holding.

Since *Matimak*, the United Kingdom has issued two separate Diplomatic Notes that expressed its "concern about a number of judicial decisions which have denied corporations of United Kingdom Overseas Territories access to United States Federal Courts." *See* Diplomatic Note No. 13/2000 from the British Embassy in Washington, D.C. to the United States State Department, Feb. 2, 2000 at 1 (located at L 29-30) [hereinafter "Feb. 2000 Diplomatic Note"]; Diplomatic Note No. 90/2001 from the British Embassy in Washington, D.C. to the United States State Department, Oct. 5, 2001 at 1 (attached as Appendix A to the Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner, dated November 21, 2001) [hereinafter "Oct. 2001 Diplomatic Note"]. The Feb. 2000 Diplomatic Note specifically stated: "The United Kingdom . . . views with great concern the potential application of the Matimak

rationale to individual Overseas Territories residents, as well as to commercial enterprises."[21] Feb. 2000 Diplomatic Note, *supra*, at 1.

The United Kingdom, in the two Diplomatic Notes, raises substantial issues of international comity and reciprocity. Both Diplomatic Notes state:

> The United Kingdom notes that all corporations validly incorporated under the laws of the United States and its territories are entitled to sue and be sued in the courts of the United Kingdom and its Overseas Territories. As a matter of international comity and reciprocity, the United Kingdom considers that United States Federal Courts should be open to corporations established in United Kingdom Overseas Territories.

See Feb. 2000 Diplomatic Note, *supra*, at 1; Oct. 2001 Diplomatic Note, *supra*, at 2. In this instance, the United

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21. The United Kingdom has proven that it takes this issue very seriously by submitting briefs to various courts that have addressed this issue, asserting that the residents and corporations of the United Kingdom Overseas Territories are its "citizens or subjects". Besides its submission to this Court of *amicus* briefs in support of Chase (at both the petition for a writ of certiorari stage and on the merits), the United Kingdom has also submitted *amicus* briefs in the following matters: (1) in support of a petition for a writ of certiorari to the Supreme Court in *Matimak*; (2) in support of the plaintiff's opposition to a motion to dismiss in the matter captioned *III Finance Ltd. v. Aegis Consumer Funding Group, Inc.*, No. 99 Civ. 2579 (DC) (S.D.N.Y.) (decision reported at 1999 WL 1080371 (S.D.N.Y. Nov. 30, 1999)), and (3) in support of appellant in the matter captioned *ART 57 Properties, Inc. v. 57 BB Property, L.L.C.*, No. 99-10385 (5th Cir.) (affirmance reported at 212 F.3d 596 (5th Cir. 2000)) (*see* L 1-36).

Kingdom has clearly explained the proper interpretation of its law regarding companies and nationality.[22] *See* Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in support of Petitioner, dated February 19, 2002. Deference should be given to a foreign land that provides a court of the United States with an interpretation of its own law. *See In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 490 (D.N.J. 1999). This is especially true in matters where a foreign nation has defined its own citizens and subjects. *See United States v. Wong Kim Ark*, 169 U.S. 649, 668 (1898). ("Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."); *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 285 (7th Cir. 1991) ("Generally accepted test for determining whether a person is a foreign citizen for purposes of 28 U.S.C. § 1332(a)(2) is whether the country in which citizenship is claimed would so recognize him.").

The United States Department of State has also made multiple submissions to various courts, urging that the

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22. The Oct. 2001 Diplomatic Note states:

> The United Kingdom believes that *Matimak* was wrongly decided, primarily because it was based on an incorrect interpretation of United Kingdom company and nationality law, as well as on a misapprehension of the constitutional relationship between the United Kingdom and its Overseas Territories.

Oct. 2001 Diplomatic Note, *supra*, at 1.

residents of the United Kingdom Overseas Territories be treated as citizens or subjects of the United Kingdom for purposes of alienage jurisdiction.[23] In this instance, where issues of foreign policy are involved, courts should "take heed of the State Department's position." *Southern Cross Overseas Agencies*, 181 F.3d at 418 ("Just as the executive is best positioned to make the determination that recognition of a sovereign is appropriate, the executive is best situated to conclude that Hong Kong was, at the time suit was filed, so closely connected to the United Kingdom that its corporations were United Kingdom subjects."); *see also Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)). The reasoning of the court in *Southern Cross* shows an appreciation of the proper balance between the Executive and the Judiciary in this area: by deferring to the Executive Branch, one avoids the conflict present in this case where the United States recognizes the United Kingdom as the sovereign over the British Virgin Islands, but the Second Circuit does not.

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23. Like the United Kingdom, the United States has submitted *amicus* briefs to this Court in support of Chase at both the petition for a writ of certiorari stage and on the merits. Additionally, the United States submitted an *amicus curiae* brief to the Second Circuit in the *Matimak* matter (*see Matimak*, 118 F.3d at 86 (noting Department of Justice's position), to the Fifth Circuit in the *ART 57 Properties, Inc.* matter (*see* L 37-63) and to the Third Circuit in the *Southern Cross Overseas Agencies, Inc.* matter (*see* 181 F.3d at 417 (noting the State Department's brief)).

Although *Matimak* has only been applied to territories of the United Kingdom, there are other nations which also have overseas territories that would be potentially subject to the same restriction on alienage jurisdiction set forth in *Matimak*.[24] One district court in the Second Circuit has recognized that the argument may be extended to corporations and residents of Aruba, which is a Dutch dependency. *Inarco Int'l. Bank N.V. v. Lazard Freres & Co.*, No. 97 Civ. 0378(DAB), 1998 WL 427618 at *1-2 (S.D.N.Y. July 29, 1998) (recognizing that defendant sought to dismiss an Aruban bank's complaint because Aruba was a Dutch dependency, but then dismissing complaint on another jurisdictional bases). It is very likely that the United States Department of State would receive similar protests from other nations, as the residents and corporations from these other nations' territories are deemed "stateless".

By declaring that the residents and corporations from the United Kingdom Overseas Territories are "stateless", the *Matimak* decision and its progeny, including the Second Circuit's decision in this case, have clearly offended the United Kingdom and jeopardized its relations with the United States. Although the *Matimak* court claimed there was no sovereign to offend (118 F.3d at 87), the position of the United Kingdom in this case shows that the *Matimak* court was clearly in error.

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24. These nations, which also have overseas territories, include France, the Netherlands, Australia, New Zealand, Denmark and Norway. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, at 9 n.3.

B. The Matimak Line of Decisions Adversely Impacts Commerce

The economic impact of shutting out United Kingdom Overseas Territories residents and corporations from federal court should not be underestimated. The United Kingdom Overseas Territories, like the British Virgin Islands, are emerging economic and financial centers. Because of favorable tax and corporate law, the Overseas Territories have been referred to as "the international equivalent of Delaware or Nevada." *Southern Cross Overseas Agencies*, 181 F.3d at 416.

For example, almost 500,000 international business companies have been incorporated in the British Virgin Islands since 1984. *See* AMS Group, *British Virgin Islands: More Than Just IBC's*, AMS Group Offshore Update Newsletter (July 2000), *available at* http://www.amsbvi.com/I49BVImorethanibcs.htm. Each of these companies, by statute, is required to conduct its business outside the British Virgin Islands (except professional contacts with lawyers, accountants, trust companies or investment advisors), so they are all cross-border or multinational corporations. British Virgin Islands International Business Companies Act § 5(1). The Cayman Islands, which has incorporated more than 40,000 companies, includes almost 600 banks and trust companies, with assets exceeding $500 billion.[25] *See* Central Intelligence Agency, *The World Factbook: Cayman Islands* (2001), *available at* http:/www.cia.gov/cia/publications/factbook/geos/cj.html. In a recent estimate, Bermuda was

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25. The Cayman Islands has been referred to as the world's fifth largest banking center. Suzanne Attewell, *Find Your Very Own Island in the Sun*, Sunday Times (London), February 10, 2002, features section.

stated to be the home of 1,400 insurance companies and 6,824 business companies.[26] (L 26).

Rather than promote economic investment and trade between the United States and these emerging financial centers, *Matimak* (and any extension of *Matimak*) adversely affects it. There is no doubt that under *Matimak*, a considerable number of foreign entities and individuals are deprived of an opportunity to have their claims heard in federal courts. Even today, foreign entities and individuals still are leery, as the Framers pointed out, of possible partiality on the part of the state courts. *See* Johnson, *supra*, at 33 ("Many foreign corporations and business associations have fears similar to those of their British predecessors."). The Oct. 2001 Diplomatic Note from the United Kingdom explicitly notes the adverse economic impact:

> The United Kingdom wishes to restate its position that corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom. The United Kingdom is therefore of the view that such corporations ought to be amenable to the alienage jurisdiction of the United States Federal Courts under 28 U.S.C. § 1332(a)(2), whether as plaintiffs or defendants. Court decisions which fail to recognise such jurisdiction may have a serious detrimental effect on the trading relationship between the United States and the United Kingdom Overseas Territories.

Oct. 2001 Diplomatic Note, *supra*, at 1-2.

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26. The Turks and Caicos Islands, another United Kingdom Overseas Territory, was also estimated to have incorporated 1911 insurance companies and 11,000 business companies. (L 26).

Although the United Kingdom Overseas Territories are becoming large economic and financial centers, if companies from these territories are unable to avail themselves of alienage jurisdiction and a federal forum, such companies may be less willing to do business in the United States. This is especially problematic when one considers that many commercial contracts and financial instruments, like the Indenture in this case, call for a forum in New York, traditionally the financial center of the United States. Petitioner is trustee under numerous sophisticated debt indentures collectively concerning billions of dollars, which contain consent to jurisdiction clauses similar to the one at issue here, signed by United Kingdom Overseas Corporations as part of major debt offerings issued in this country. Corporations and residents from the United Kingdom Overseas Territories, knowing they cannot avail themselves of the stability and certainty of a federal forum, will be less willing to do business in and with the United States. Moreover, the United States financial institutions who invest billions of dollars in such overseas territories companies will also be reluctant to invest in such entities if they cannot avail themselves of the stability, certainty and uniformity of a federal forum. Such a result further defeats the purposes behind alienage jurisdiction.

* * * * *

In sum, while the *Matimak* court properly recognized the need for deference in the interpretation of foreign law and properly identified one of the purposes of alienage jurisdiction (*i.e.*, avoiding foreign policy entanglements), the *Matimak* court reached a conclusion that is simply wrong. The *Matimak* court, without the benefit of the United Kingdom's authoritative briefing, completely

misinterpreted the law of the United Kingdom. Through this misinterpretation, the *Matimak* court created an entanglement with "a strong ally [and] the very country the drafters of the alienage jurisdiction provision had in mind more than two hundred years ago." *Koehler*, 229 F.3d at 189 (Sotomayor, J., dissenting). The *Matimak* decision in its rush to render residents of United Kingdom Overseas Territories "stateless" has "given rise to precisely the sort of damage to foreign relations the statute was meant to avoid." *Id.*

In this case, the Second Circuit has inexcusably compounded its error in *Matimak* by refusing to look at any of the indicia that clearly demonstrate that residents and corporations from the British Virgin Islands are under the sovereignty of the United Kingdom or to accord any weight to the position of the United States in this matter. A review of the Constitution of the British Virgin Islands shows that the United Kingdom retains full sovereignty over the islands, remains responsible for core government functions, and has the right to review all laws passed by a legislature that has sworn its allegiance to the United Kingdom. In light of the foregoing, as Judge Sotomayor has pointed out, "[t]he people of Bermuda [and the other United Kingdom Overseas Territories] would undoubtedly be surprised to learn that they are 'stateless.'" *Id.* at 188. This is especially true for the British Virgin Islands, whose own Attorney General has opined that the residents and corporations are subjects of the United Kingdom. (L 35-36). Defining millions of people and corporations from the United Kingdom's (and other nation's) territories as "stateless" contradicts basic notions of western jurisprudence, violates the intent of the Framers of the Constitution, and unsettles an area of law which has been applied without incident for two centuries.

CONCLUSION

For all the reasons set forth herein, the decision of the United States Court of Appeals for the Second Circuit should be reversed, and the matter remanded to the Second Circuit for a decision on the merits of Traffic Stream's appeal.

Dated: February 19, 2002

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE CHASE MANHATTAN BANK, as Indenture Trustee, under the Indenture, dated as of May 6, 1998,

Petitioner,

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether corporations organized under the laws of the British Virgin Islands and other United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of alienage diversity jurisdiction under 28 U.S.C. § 1332(a)(2).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Respondent Traffic Stream (BVI) Infrastructure Limited states that its parent corporation is Traffic Stream (China) Infrastructure Company Limited, and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

In 1998, Respondent Traffic Stream (BVI) Infrastructure Limited issued $119 million in notes, subject to an indenture under which Petitioner Chase Manhattan Bank was the trustee. (JA 25a).[1] Under the indenture, the parties agreed to jurisdiction over any disputes over payment of the notes in both the state and federal courts located in the Borough of Manhattan, in the state of New York. (JA 85a-87a).

Petitioner is a New York corporation.[2] It sued Respondent in the United States District Court for the Southern District of New York, claiming that Respondent had defaulted on its obligations under the notes and indenture. The asserted basis for subject matter jurisdiction was that Respondent was a British Virgin Islands corporation with its "principal office" in the British Virgin Islands (Complaint ¶ 3, JA 8a), that the amount in controversy exceeded $75,000 (Complaint ¶ 1, JA 7a), and that there was therefore jurisdiction under 28 U.S.C. § 1332.

Respondent admitted the allegation of subject matter jurisdiction. (Answer ¶1, JA 251a). Neither party raised the issue of subject matter jurisdiction at any further stage of the proceedings below. After Respondent answered, Petitioner moved for summary judgment. The district court rejected Respondent's defenses and granted Petitioner's motion. (JA 263a-264a). Respondent appealed to the United

1 References hereinafter to "JA __" are to pages in the Joint Appendix filed with the Supreme Court.

2. Petitioner did not allege the state of its principal place of business, but instead alleged that its "Capital Markets Fiduciary Services Office" was located in New York. (Complaint ¶ 2, JA 8a).

States Court of Appeals for the Second Circuit and, at oral argument, the Court requested supplemental briefing on the issue of whether subject matter jurisdiction might be absent. (JA 265a-266a, 279a). After the supplemental briefing, the Court of Appeals determined that Respondent was not a foreign citizen or subject. It entered an order reversing the district court's judgment and directing it to dismiss the action without prejudice. (Cert. App. 7a).[3]

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Second Circuit was entirely correct in its determination that there was no subject matter jurisdiction over this action. Respondent is simply not a foreign citizen or foreign subject, which are the only bases for the assertion of alienage diversity jurisdiction under 28 U.S.C. § 1332(a)(2). It is incorporated in the British Virgin Islands, which is not a foreign state. The people of those islands were not regarded by their colonial power (the United Kingdom of Great Britain and Northern Ireland) at the time of the suit's commencement as citizens or subjects of the United Kingdom. The suit therefore should never have been brought in a federal court. Instead, it should have been brought in a state court (to which Petitioner had already consented) or in a court of the British Virgin Islands.

The alienage diversity statute, 28 U.S.C. § 1332(a)(2), does more than simply divide the world into the United States and everyone else. It also divides aliens into those who are foreign citizens or subjects, on the one hand, and those who are not. Only the former are welcome to litigate in federal

3. References to "Cert. App. __" are to pages in the Appendix annexed to the Petition for Writ of Certiorari.

courts on the basis of diverse citizenship. The rule stands in contrast to suits involving a federal question, in which all aliens (regardless of citizenship or subjectship) are allowed to litigate in federal courts. The rule finds its reason in the development of the law of citizenship and subjectship in our Republic's early history. Indeed, without the concept, the founders of our nation would have had no legal basis on which to claim that they were absolved of their allegiance to the same United Kingdom which today claims the allegiance of the residents of the British Virgin Islands. Congress's intentions can be discerned from the little evidence left behind in the legislative history of the statute, as well as in its creation of a parallel set of restraints on the extent of domestic diversity jurisdiction vis-à-vis United States territories, the District of Columbia and Native Americans. In addition, Congress expressed the same distinction in its 1798 enactment of the Alien Enemies Act.

The determination of whether British Virgin Islands corporations are foreign citizens or subjects depends in the first instance on how the United Kingdom of Great Britain and Northern Ireland views the natural persons of the British Virgin Islands for purposes of its own law. In that regard, the Second Circuit acted properly. The record is clear that the United Kingdom today views them only as "United Kingdom nationals" and has specifically excluded them from the categories of citizens or subjects. The matter is driven home even more forcefully by virtue of an impending amendment to United Kingdom law which will (in the future) confer United Kingdom citizenship on those colonial citizens who request it, but will withhold that citizenship from those who request it to be withheld. Until that amendment takes effect, and until colonial citizens choose to exercise their power to elect citizenship status, they are not citizens or subjects of a foreign state.

None of the policies that were thought by the Framers of the Constitution to justify the creation of alienage diversity jurisdiction is implicated by this case. There is no domestic bias against an innocent foreigner, because the party seeking to invoke alienage diversity jurisdiction is a domestic plaintiff. There is no adverse impact on foreign commerce because colonial trade has always been outside the ordinary stream of international commerce. Weighed against these considerations, though, are an important set of domestic policies which are promoted by limiting the scope of alienage diversity jurisdiction. The policy encourages colonial residents to immigrate to the United States, rather than to other nations. The policy discourages American firms from expatriating their businesses to foreign tax and bank havens. The policy discourages the use of jurisdictions that have been associated with criminal enterprises such as narcotics trafficking and money laundering.

The rule advocated by the Petitioner is not justified on the ground that the colonial entities are being treated differently in the United States from the way in which United States entities would be treated in the colonies. Each is subject to the local courts of the other. A United States entity could ask for nothing more in the British Virgin Islands because there is no dual system of federal courts in that jurisdiction.

Finally, there exists an international norm that would be subverted by adoption of the rule proposed by Petitioner. The international community has firmly expressed its opposition to the continuation of colonial status. To adopt a rule that eliminates one of the costs associated with maintaining colonies can only serve to lengthen the time in which it takes to bring about full decolonization and self-determination, as required under the resolutions of the United Nations.

ARGUMENT

I.

THE ALIENAGE DIVERSITY STATUTE DOES NOT CREATE JURISDICTION OVER SUITS BY AND AGAINST FOREIGN NATIONALS WHO ARE NEITHER CITIZENS NOR SUBJECTS OF FOREIGN STATES

A. Congress's Statutory Mechanism Distinguishes Colonial Residents from Foreign Citizens and Subjects.

Both in its creation and in its modern form, the statute that created alienage diversity jurisdiction was flexible, adapting to accommodate ever-changing notions of the relation between person and state. Today, the statute operates to exclude the people and corporations of the British Virgin Islands from federal courts because (as discussed in Point II below) they are simply not citizens or subjects of a foreign state under the relevant United Kingdom law. The basis for excluding them, though, is a function of the political choices that Congress had to make in 1789 when fashioning a new type of jurisdiction (diverse citizenship) for a new type of court (federal), and the recognition that outside social and political forces would necessarily have an effect on Congress's choice.

True to the theory embraced by this nation's early judges and political theorists, the relationship between England and its colonial people did evolve, and the alienage diversity statute has accommodated that evolution. The common law notion that everyone born within the King of England's dominions was a full British subject gave way, by statute, to

a variety of subclasses of relations between person and nation, only a few of which rose to the level of citizen or subject. The remainder — including those having the status of the Respondent in this case — are not amenable to alienage diversity jurisdiction. Today, the people of the British Virgin Islands[4] are "United Kingdom nationals" who were not born or naturalized in the British Isles and do not pretend to enjoy the full measure of civil and political rights afforded to those born in England, Scotland, Wales or Northern Ireland. They therefore cannot sue or be sued in the federal courts on the basis of alienage diversity jurisdiction. Instead, those suits must be heard in a state court or in a British Virgin Islands court with jurisdiction over both the person and the subject matter.

1. Eighteenth Century American Political Theory Recognized the Fluidity of the Labels of Citizen and Subject.

When Congress first enacted a statute to create diversity jurisdiction (and its subset of alienage diversity jurisdiction[5]) in 1789, it described the group allowed into the newly-created federal courts as "aliens", even though the constitutional grant

4. The formerly-designated "British Crown Colonies" in the Caribbean include the British Virgin Islands, the Cayman Islands, Montserrat and Turks and Caicos. They are now classed as Overseas Territories along with Bermuda, Anguilla, Gibraltar, the Falkland Islands, Pitcairn Island, St. Helena and dependencies, South Georgia and the South Sandwich Islands, as well as the British Antarctic Territory, the British Indian Ocean Territory and a military area on Cyprus.

5. Respondent refers here to "alienage diversity jurisdiction" only because the name has been commonly used for many years. As the argument makes plain, though, the name is not descriptive because this form of diversity jurisdiction does not extend to all aliens.

of authority extended to "foreign . . . Citizens or Subjects." *Compare* U.S. Const. Art. III, § 2, Cl. 1 *with* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. That choice of language masked a then-unresolved debate over who was an alien, and what obligations flowed between a nation and its people. The constitutional provision was flexible enough so that, as the political relationship between nations and people abroad evolved, the changing relationship could be reflected in the United States' treatment of those persons in federal courts. Regardless of the labels used, though, the outer limit of federal jurisdiction was set at foreign citizens and subjects, and the statute therefore excluded those persons who, while foreign nationals, are neither citizens nor subjects of foreign states.

At first, Congress's use of the word "aliens" in the Judiciary Act of 1789, § 11, 1 Stat. 78, did not limit in any way the number of foreigners who had access to federal courts because the term "aliens" was indeed coextensive with the combination of "foreign citizens" and "foreign subjects." Nevertheless, the delegates to the Constitutional Convention and the members of the early Congresses recognized that the terms were fluid. They were certainly aware of the traditional view that many of their number were "natural-born subjects" because their "parents, at the time of their birth, were under the actual obedience of our king, and whose place of birth was within his dominions." *See* 1 Matthew Bacon, A New Abridgment of the Law 125 (6th ed. 1807). They were also aware that many others were "natural subjects" because they were born within the king's ligeance "in Ireland, Scotland, or Wales, or any of the king's plantations." *See id.* at 126.

The colonists' status was not on a par with subjects in England though, for as they knew, the colonies in which they

lived were not part of the United Kingdom of Great Britain and Ireland. 1 William Blackstone, Commentaries on the Laws of England 123-24 (1813 ed.).[6] They also knew that the United Kingdom's laws and treaties offer no benefit or protection to residents of colonies unless the law or treaty specifically provided so. *See* 6 Halsbury's Laws of England ¶ 1105 at 554-55 (4th ed. 1991). Colonial residents were therefore in the unenviable position of being subject to the King's command, yet lacking the ordinary recourse of any natural-born subject residing in England.

Petitioner's argument for reversal is inconsistent with the political reality faced by the men who drafted the Constitution and the Judiciary Act of 1789. In contrast with the reality that the relationship between person and nation was evolving, Petitioner's argument for reversal depends on the assumption that the terms "citizen" and "subject" are static terms whose meaning was fixed in 1789 and cannot evolve. (Petitioner Br. at 14; US Amicus Br. at 15).[7] Without

6. The colonists also knew that there were other persons who, while denominated "subjects" nevertheless occupied a second-class legal status. These were the "denizens," people who became subjects by a Royal charter rather than by naturalization under an act of Parliament. 1 Matthew Bacon, A New Abridgment of the Law 129 (6th ed. 1807). Denizens were a step above aliens in that they could own land, but below full subjects in that they could not inherit, or hold office. *Id.* Thus, while they were technically "subjects" in 1789 in that they owed obedience to the King, their status was unlike (and inferior to) every natural-born British subject. *See* James H. Kettner, The Development of American Citizenship, 1608-1870 at 5 (1978) (tracing degrees of subjectship under English law).

7. References to "Petitioner Br. __" are to pages in the Brief of Petitioner. References to "US Amicus Br. __" are to pages in the Brief for the United States as Amicus Curiae Supporting Petitioner.

that assumption of stagnation, Petitioner cannot advance the argument that a colonist occupied exactly the place in 1789 British law as a British Dependent Territories Citizen occupies in 2002. That assumption has no basis in the law. Instead, the constitutional and statutory provisions at issue were drafted when the political and legal theorists knew that the concepts of citizenship and allegiance were in a state of flux, and that a static definition would be useless.

Petitioner's proposed interpretation of the critical terms in the alienage diversity statute can be supported only by an outdated application of England's medieval common law. That early view is documented in the authorities so ably collected by the United States. (US Amicus Br. at 15). Under that early view, the nation to which the American colonists were subordinate — the United Kingdom of Great Britain and Ireland — had many overseas possessions, dominions, colonies, territories and plantations, each of which had been settled in a variety of ways by British subjects. Each separate entity had to account for the status of the natives who had been born there both before and after British rule and the English view was that each person born within the King's dominions was indeed a subject.

Unfortunately for Petitioner's argument, the medieval perspective only marks a starting point of the inquiry as to what Congress created in 1789. To complete the inquiry, one must necessarily refer to the subsequent development of the law of subjectship and citizenship in both the United States and the United Kingdom.

In fact, the medieval view that underlies the Petitioner's argument did not enjoy American support, and its theoretical underpinnings evaporated in the United Kingdom during the

late eighteenth century.[8] For example, despite the common law's teaching with respect to ligeance, the American colonists were painfully aware of their inferior political status. Lord Blackstone had already explained the attenuated connection between the American colonies and plantations, on the one hand, and England on the other, as follows:

> [O]ur most distant plantations in America, and elsewhere, are in some respect subject to the English laws. Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only by finding them desart and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. . . . But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he actually does change them, the ancient laws of the country remain, unless such as are against the law of God, as in an infidel

8 The history of the development of both American and English views of subjectship and citizenship is traced in James H. Kettner, The Development of American Citizenship, 1608-1870 (1978). *See also* Clive Parry, British Nationality 5-7 (1951) (tracing the development of subjectship, citizenship and nationality after *Calvin's Case*, 77 Eng. Rep. 377 (1608)). Notable among Professor Kettner's findings are the early abandonment in England of the strictest view of subjectship as reflected originally by Lord Coke in *Calvin's Case*, and relaxed in the writings of John Locke. *See* Kettner, *supra*, at 53-61. He explains in great detail the historical basis for the plain conclusion that the medieval English view was inapposite to life in the colonies. *Id.* at 153-71.

> country. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives, with what natural justice I shall not at present inquire, or by treaties. And therefore the common law of England, as such, has no allowance or authority there; *they being no part of the mother country, but distinct, though dependent, dominions. They are subject, however, to the control of parliament; though, like Ireland, Man, and the rest, not bound by any acts of parliament, unless particularly named.*

1 William Blackstone, Commentaries on the Laws of England 123-24 (1813 ed.) (emphasis added). It was clear, therefore, that these distant colonies simply were not a component part of the United Kingdom. In the view of the Americans, the land and its products, and by extension the people who lived there, were treated by England as part of its property, but not its polity.

The actual conflict between the English view of allegiance and the American view was joined in the Revolution. The English common law view of perpetual allegiance was starkly at odds with the American view of volitional allegiance, which held instead that the King had an affirmative obligation to provide protection, and that if the King violated his obligation, then his people would no longer owe him allegiance. The dichotomy between the medieval English and the modern (Revolutionary-era) American views has been summarized by the leading scholar of the historical development of American citizenship:

> The central purpose of American polemicists and pamphleteers in the years before independence

> was to defend the rights of the colonial communities against the encroaching power of the imperial authorities in London. As colonial spokesmen developed their arguments they steadily moved away from the traditional ideas of allegiance that still permeated British legal and constitutional thought. By 1776 American theorists had rejected the concept that the colonists were perpetually bound by their subjectship. Philosophy, law, and common sense had convinced them that subjects owed obedience only in return for protection of their fundamental rights. Allegiance was contractual, and contracts could be broken or annulled.
>
> James H. Kettner, The Development of American Citizenship, 1608-1870 at 173 (1978).

There are numerous examples, especially in the early reported cases involving pleas in abatement, of the changing American view. *See, e.g., Inglis v. Trustees of the Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99, 156-64 (1830) (Story, J., concurring in part and dissenting in part); *M'Ilvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209, 211 (1808) (Mem.). Indeed, *Inglis* is especially apposite, for the United States relies upon the case for its citation to the traditional definition of subjectship, while omitting Justice Story's extensive discussion of how the concept has changed since the traditional view was expressed.[9] *See Inglis v. Trustees of the Sailor's Snug Harbour*, 28 U.S. (3 Pet.) at 156-57.

9. There is clear documentary evidence of the break in political theory in the Declaration of Independence. The litany of offenses that the Continental Congress set forth constituted the reasons why the King no longer protected the colonies. The conclusion marked the assertion that allegiance was not perpetual: "these United Colonies are . . . Absolved from all Allegiance to the British Crown. . . ."

The scant documentary record relied upon by Petitioner in support of its English common law medieval view reflects the wholesale absence of any discussion at all of the critical distinctions between different classes of foreigners. Those distinctions are important because they support the notion that "aliens" and "foreign citizens and subjects" would not always be synonymous. Petitioner's argument is that the dearth of discussion and the seemingly interchangeable use of the terms "aliens" and "foreigners" reflects a conscious decision on the part of Congress and the delegates to the Constitutional Convention to extend diversity jurisdiction to everyone born in a foreign land. (Petitioner Br. at 13). That argument, though, is a weak one because it fails to account for the questions that permeated the minds of the colonial lawyers who learned the English common law, including whether subjects could shed their allegiance and associate to form a new government. The mechanism that the Constitutional Convention chose allowed the jurisdiction of federal courts to adapt to the then-evolving notions of citizenship. Subsequent political developments abroad made the wisdom of that choice apparent.[10]

2. The Judiciary Act of 1789 Extended Alienage Jurisdiction to Its Constitutional Limit.

When Congress inserted the word "alien" into four separate sections of the Judiciary Act of 1789, ch. 20, §§ 9, 11, 12, 13, 1 Stat. 78, it did so knowing that (at that time) all aliens were either foreign subjects or citizens.[11] It does not follow, however,

10. One immediate application of the theory of volitional allegiance justified the French Revolution of 1789.

11. There is no dispute as to the reasons why the Constitution includes a provision authorizing the Congress to create federal courts

(Cont'd)

that either the Constitutional Convention or the First Congress decided that foreign citizens and subjects would always exhaust the class the aliens, nor that all aliens needed perpetual access to the federal courts in order to promote the nation's policies.

Petitioner appears to attribute, without any support whatsoever, the choice of words to mere happenstance. (Petitioner Br. at 13). While the documentary records of the deliberations leading to the Judiciary Act of 1789 are cryptic and incomplete,[12] there are nevertheless some clues that

(Cont'd)
with jurisdiction over suits between United States citizens and "foreign . . . Citizens or Subjects". The foreign entanglements justification and the commerce justification are old and familiar. In this regard, both Petitioner and *amicus* United States rely on Hamilton's writing in the Federalist No. 80 to support the idea. (Petitioner Br. at 11; US Amicus Br. at 14). A critical reading of the last sentence of that passage, though, reveals that it is an argument for exclusive federal jurisdiction over claims by and against foreigners involving a federal question and is therefore better suited to a case arising under 28 U.S.C. § 1331 than under 28 U.S.C. § 1332(a). *See* The Federalist No. 80 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

12. Since there is no verbatim transcript of the Senate's proceedings of that era, and the reports of the House proceedings are both unofficial and spotty (*see* 1 Annals of Congress 922 (Joseph Gales ed., 1834) (reporting "some time being spent" on the Judiciary bill without reporting the substance of the debate)), it is quite difficult to infer precisely what the intention of the legislature was in this case where no record was ever kept. Charles Warren's seminal article on the Judiciary Act's history was based on archival materials that he had found in the attic and basement of the Capitol, as well as in newspapers of 1789, but his article offers no insight into the reasons for the choice of words describing alienage diversity jurisdiction that
(Cont'd)

members knew that the definitions of the day were fluid. For example, one supporter of the Judiciary Act argued that

> [h]e wished . . . to see justice so equally distributed, as that every citizen of the United States should be fairly dealt by, and so impartially administered, that every *subject or citizen* of the world, *whether foreigner or alien*, friend or foe, should be alike satisfied; by this means, the doors of justice would be thrown wide open, emigration would be encouraged from all countries into your own, and, in short, the United States of America would be made not only an asylum of liberty, but a sanctuary of Justice.

1 Annals of Congress 853 (Joseph Gales ed., 1834) (remarks of Rep. Vining) (emphasis added). His comments evidence an understanding that there was a difference between the term "foreigner" and that of "alien", and further that the terms "citizen" and "subject" themselves had separate meaning. Another representative asked whether the jurisdiction over alienage diversity claims ought to be expanded and made exclusive, stating that

> [i]f it is the right of an alien or foreigner to sue or be sued only in the courts of the United States, then they have a right to that jurisdiction complete,

(Cont'd)
Congress made in section 11. Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923). Either Professor Warren could not find anything on the subject in the hodgepodge of materials to which he had access, or he found it and decided that it was not significant enough to include in his article.

> and then Congress must institute courts for taking exclusive cognizance of all cases pointed out in the constitution; but this would be contrary to the principle of the bill, which proposes to establish the inferior courts with concurrent jurisdiction with the State courts.

1 Annals of Congress 841 (Joseph Gales ed., 1834) (remarks of Rep. Stone).

Shortly after the Judiciary Act was enacted, the House of Representatives delegated to the Attorney General the task of reporting on the judiciary system and to propose a plan of revisions. Among the revisions proposed was to eliminate the reference to "aliens" and adopt the constitutional language of "foreign . . . citizens, or subjects." 37 American State Papers Miscellaneous 29. He viewed the needed revisions as "merely temporary; because he trusts that the necessity of a federal code is too striking to escape the attention of the House."[13] *Id.* at 36. It cannot be argued, then, that the choice of words was irrelevant. Instead, the choice had consequences whose import was simply not felt immediately.

3. Congress's Intention to Deny Alienage Diversity Jurisdiction to Foreign Nationals Who Are Not Foreign Citizens or Subjects Can Be Inferred From a Parallel Domestic Policy.

There was nothing odd or incongruous in Congress's decision to divide prospectively foreigners into two classes, only one of which would have access to the newly-created federal courts. Congress did exactly the same thing with a

13. Unfortunately, though, the Congress did not address the problem for another eighty-five years, when the Revised Statutes were compiled.

large class of domestic residents, excluding them from the domestic diversity jurisdiction it created in the same section 11 of the Judiciary Act of 1789.

Residents of the District of Columbia were, from the earliest times, held not to be citizens of a "State" and therefore not amenable to diversity jurisdiction. *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1805); *Barney v. Baltimore City*, 73 U.S. 280, 287-88 (1867). Residents of American territories were not citizens of a "State" and therefore not amenable to diversity jurisdiction. *Corp. of New-Orleans v. Winter*, 14 U.S. (1 Wheat.) 91, 94 (1816). And, finally, Native Americans were not citizens of a State, and therefore were not amenable to diversity jurisdiction. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987) (dictum) (relying on Indians' status as non-State citizens nor citizens of foreign state under *Cherokee Nation v. Georgia*, 5 Pet. 1, 15-18 (1831) and *Elk v. Wilkins*, 112 U.S. 94, 102-103 (1884)). Yet, notwithstanding the fact that they were not State citizens (and, in the case of many Native Americans and territorial residents, not United States citizens either) each of these classes plainly was not foreign. They each occupied a unique sphere, with rights below that of an American citizen and above that of an alien. Congress has long known the difference between what we would today call "nationals" and its subset of "citizens".

In response to each of the well-established limitations on domestic diversity jurisdiction, the course of action was exactly the same. After over a century of acquiescence in the Court's determinations, Congress decided to extend, by statute, the jurisdiction of the federal courts in diversity cases involving residents of the District of Columbia and of the territories. *See National Mut. Ins. Co. of District of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (plurality

opinion) (upholding constitutionality of statute creating diversity jurisdiction over suits between District of Columbia citizens and citizens of states).

Since Congress recognized the domestic difference between its citizens and its nationals, and it permitted only the former to have access to the new federal courts on the ground of diversity of citizenship, what reason is there to surmise that Congress created a broader right of access to federal courts for non-citizen nationals of other countries than it created for non-citizen nationals of our own country? There is nothing in the legislative record to suggest that Congress ever intended to draw such a distinction. A far more reasonable construction would be to interpret the two diversity provisions (alienage and domestic) in tandem with one another, and infer that if Congress intended to exclude non-citizen American nationals, then it intended the same treatment for non-citizen foreign nationals as well.[14]

Once again, the near-contemporaneous documentary record supports the view that Congress took a consistent approach, standing in stark opposition to the Petitioner's contention. In 1805, a group of British merchants petitioned the Congress to eliminate the "amount in controversy" limit on alienage diversity actions. The committee to which the petition was referred issued a negative report. It noted first that there was no justification for treating foreign claims differently from domestic claims ("Every consideration, opposed to such a measure in relation to the former

14. Strictly speaking, the distinction was drawn by this Court, and Congress acquiesced in the Court's determination. Residents of the District of Columbia and United States territories did not gain access to federal courts for diversity suits until 1940. Act of April 20, 1940, c. 117, 54 Stat. 143.

[domestic] cases, must resist the idea with at least equal force, when applied to the cases last mentioned [regarding aliens].") 37 American State Papers Miscellaneous 420. It noted second that it would convey to foreigners a superior right to that enjoyed by domestic litigants, which would disfavor domestic litigants.

> To grant the prayer of the petitioners merely on this ground of complaint, would be to oppress a considerable number of citizens, for the accommodation of a much smaller number who are not citizens. A principle which would justify this step is a sort of principle totally inadmissible by this committee as a rule by which to decide on what is just and proper.

Id.

Congress declined the invitation of the British merchants to give them greater access to the federal courts in diversity actions than it afforded to American citizens. In light of that action, it defies logic to assume that Congress nevertheless decided silently to grant the residents of Britain's colonial territories greater access to the federal courts in diversity actions than it afforded to the residents of the United States' territories.

B. Congress's Subsequent Enactment of the Alien Enemies Act Confirms Its Intention To Maintain A Class Distinction In The Judiciary Act.

A scant nine years after the adoption of the Judiciary Act, Congress again addressed the problem of classifying foreigners. It did so in a way that rebuts the Petitioner's

contention in this case because its choice of words demonstrates that it knew how to denominate foreign nationals who were neither foreign citizens nor foreign subjects.

Congress needed to group all foreign nationals together in order to promote a domestic policy in the Republic's early history when it enacted the Alien Enemies Act in 1798. In that statute, Congress identified the relevant enemy as "foreign nation or government" and then identified four classes of males over the age of fourteen who could (in the event of a Presidential proclamation) be "apprehended, restrained, secured and removed, as alien enemies." They were "natives, citizens, denizens or subjects of the hostile nation or government." Alien Enemies Act, ch. 66, § 1, 1 Stat. 577 (1798). Congress provided further that such aliens (using the description of "natives, citizens, denizens or subjects") who were not charged with "actual hostility, or other crime against the public safety" would be permitted time to accumulate their property and leave the country, in accordance either with a treaty or (in the absence of a treaty) "according to the dictates of humanity and national hospitality." *Id.* That distinction continues to this day, having been substantially re-enacted in the Revised Statutes, R.S. § 4067, amended to exclude enemy females as well as males in 1918 (Act of April 16, 1918, c. 55, 40 Stat. 531), and is now codified at 50 U.S.C. § 21.[15]

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15. The Alien Enemy Act has been relatively uncontroversial, in distinction with the Alien Act adopted less than two weeks earlier. *Compare Ludecke v. Watkins*, 335 U.S. 160, 162 (1948) (Alien Enemy Act has been re-enacted without substantial change) *with Johnson v. Eisentrager*, 339 U.S. 763, 774 n.6 (1950) (Alien Act faced substantial opposition).

Congress's designation of subclasses of foreign nationals was important both in its description of the domestic view of foreigners and in its recognition of the United States' treaty obligations. By conceding that the United States would abide by its treaty obligations with respect to non-hostile foreign "natives, citizens, denizens or subjects", Congress recognized that our treaty obligations might distinguish between and among those subclasses, and that foreign nations might wish (for their own purposes) to distinguish among those subclasses. In fact, treaties of that era did distinguish between the property rights of combatants and non-combatants. *See, e.g.*, Treaty of Friendship (Pinckney's Treaty), Oct. 27, 1795, U.S. Spain, art XIII, 8 Stat. 138; Convention between the French Republic and the United States of America, Sept. 30, 1800, art. VIII, 8 Stat. 178; Treaty Of Peace, Friendship, Limits, And Settlement Between The United States Of America And The United Mexican States (Treaty of Guadalupe Hidalgo), Feb. 2, 1848, art XXII(1), 9 Stat. 922.

Congress's choice of words in the Alien Enemies Act was especially important in that it reflected the new nation's collective view of the status of persons both under British law and under the evolving American law. The medieval English view — that the world was divided into subjects and aliens, and that any person born within the King's dominions was a subject — found two bases for allegiance: connection to the land and the ties of blood. Those who lacked either were aliens, and they could become subjects through either naturalization or denization. The American view was more subtle, though, for it recognized that since denizens had no inheritable blood, they should be accounted for separately, and that natives whose tie was to the land rather than to the person of the King might also have a different set of incentives for loyalty. *See generally* Kettner, *supra*, at 173-

209 (tracing the history of the concept of volitional allegiance through development of colonial and early state statutes and cases.)

The consequence of the American view of British status is that it recognizes the inherent class distinctions in foreign countries' treatment of their nationals, and then applies those distinctions in interpreting domestic law. The distinction is both important and not accidental. In *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898 (2d Cir. 1943), for example, the issue was whether the United States could deport, as a German citizen, an Austrian Jew living in the United States solely by virtue of the fact that the United States' enemy, Germany, had annexed Austria and therefore claimed Austrians as its citizens.[16] By relying upon the subclass distinctions set forth in the statute, the court ignored the label applied to the prospective deportee in that case and therefore advanced a domestic interest in preserving human rights against a genocidal regime.

C. Subsequent Revisions of the Diversity Statute Have Emphasized The Distinctions Between Foreign Nationals and Foreign Citizens or Subjects.

Petitioner's search for support in the sequence of amendments to the Judiciary Act of 1789 is fruitless, for the record actually undercuts the Petitioner's claim. (Petitioner Br. at 14). Petitioner's argument is that Congress intended

16. The Second Circuit observed that the term "natives" means those who were born on the soil of the foreign enemy. 137 F.2d at 903 n.3. That definition therefore permits detention of those who might have a natural affinity for the enemy by virtue of their connection to the land, even if they were not citizens, subjects or denizens.

no substantive change when it removed the word "aliens" from the statute, and that the Court should therefore fashion a rule extending diversity jurisdiction to all aliens, despite the plain language of both the Constitution and 28 U.S.C. § 1332(a)(2).

The slim reed of legislative history does not support the weight of the Petitioner's argument. There is no mention of any reason for the change in language in any of the legislative debates of the day. Yet, there is nothing remarkable in this dearth of legislative history because the provision at issue affected only the modest number of colonial residents. It would not likely be the subject of debate in Congress when more important matters (such as the revision and compilation of the entire existing body of American statutes) needed to be discussed. Nevertheless, when the Revised Statutes were adopted the Congress did substitute the narrower "foreign citizens or subjects" language for the broader "aliens" language, just as the Attorney General had suggested some eighty-three years earlier.

Petitioner dismisses the significance of the amendment by suggesting that Congress was addressing a different problem: to clarify that federal courts lack jurisdiction over suits between aliens. (Petitioner Br. at 14). That argument makes little sense, for there was no confusion on the point in 1873. The issue had been settled seventy-five years earlier, in *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800). One might expect that if Congress had taken the time to codify a rule attendant to diversity jurisdiction, then the natural choice would have been the complete diversity rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). We should be entitled to take Congress at its word, and

therefore assume that changing the language to conform to the constitution was designed to have a real effect.[17]

D. The Historical Record Makes Clear That The Second Circuit Acted Properly.

It is indeed surprising to see Petitioner suggest that the Second Circuit's course of decisions beginning with *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997) represented a departure from over two centuries of jurisprudence. (Petitioner Br. at 15). The argument suggests that the Second Circuit somehow disturbed a long-standing line of cases in which the residents of British colonies had routinely sued and been sued in federal courts on the basis of alienage diversity jurisdiction. Nothing could be further from the truth.

If the law were as Petitioner suggests it should be, then one would expect that 213 years of reported federal decisions would include a wealth of cases involving alienage diversity jurisdiction over colonial residents. Such a search would be futile, although there are many cases reported in the state courts where alienage is offered as a plea in abatement. *See, e.g., Scanlan v. Wright*, 30 Mass. 523 (1833); *Coxe v. Gulick*, 10 N.J.L. 328 (1829); *Clarke v. Morey*, 10 Johns R. 70 (N.Y. 1813). The reality is that either colonial residents have sued and been sued in state courts of general jurisdiction, where subject matter jurisdiction is not generally subject to question, that the cases have not been removed to federal courts, or that the problem is truly insignificant.

17. In this instance, where Congress changed the language to that contained in the Constitution, the change would appear to be immune from the charge of error or surplusage. *See United States v. Auffmordt*, 122 U.S. 197, 210 (1887) (1875 revision corrected errors and omissions in the 1873 Revised Statutes).

II.

UNITED KINGDOM LAW CREATES A DISTINCTION BETWEEN ITS NATIONALS AND ITS CITIZENS WHICH IS DISPOSITIVE FOR PURPOSES OF DETERMINING ALIENAGE DIVERSITY

The law of the United Kingdom today marks a clear distinction between "nationals", on the one hand, and "citizens" or "subjects" on the other.[18] Petitioner asks this Court to ignore the plain language of the United Kingdom's statute (the British Nationality Act 1981), to ignore the reason behind that statute, and instead to expand the jurisdiction of federal courts beyond that intended by Congress. There is no basis for granting Petitioner's request.

The Petitioner's argument is that the United Kingdom of Great Britain and Northern Ireland today has a group of persons (both natural and juridical) under its "protection" beyond the British Isles, that these persons are United Kingdom "nationals" and that these persons should therefore be deemed "citizens or subjects" for purposes of the diversity alienage statute.[19] (Petitioner Br. at 20-24). That argument in turn relies upon the analysis of United Kingdom law

18. Indeed, the evolution of the United Kingdom's treatment of its colonial residents makes clear that the colonial residents have lost any claim they may have once had to proceed as parties in federal courts under alienage diversity.

19. A British Protected Person cannot in any sense be deemed a subject because that status belongs to those "people who had placed themselves under the protection of the British Crown, without becoming the subject of the Sovereign." Ian A. MacDonald & Nicholas J. Blake, MacDonald's Immigration Law and Practice in the United Kingdom 107 (3d ed. 1991).

offered in the *amicus* brief of the United Kingdom. (UK Amicus Br. at 9-30).[20] Even accepting the United Kingdom's own interpretation of its law, though, the argument does not support the conclusion.

First, as to natural persons, the term "United Kingdom national" includes the two groups who are amenable to 28 U.S.C. § 1332(a)(2): "British citizens" and "British subjects under Part IV of the [British Nationality Act of 1981]". (Lodging at L-31).[21] But the term also includes four groups of United Kingdom nationals who do not fall within the statute's reach: British Dependent Territories citizens, British Nationals (Overseas), British Overseas citizens and British protected persons. *Id.* British Dependent Territories Citizenship (which is applicable to the British Virgin Islands) is, under the statute, entirely separate from British Citizenship. British Nationality Act 1981, cl. 15-25.

Second, corporations were never entitled to citizenship or subjectship, so they fell under the broader term of "United Kingdom nationals." *Id.*; *see* Clive Parry, British Nationality 5 (1951). Under that doctrine, there could and should be no alienage diversity jurisdiction over suits by and against corporations chartered in one of the British Dependent Territories because the assumptions underlying the fiction of domestic diversity jurisdiction for corporations are inapposite. The domestic theory, espoused in *Louisville C. & C.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 553-55 (1844)

20. References to "UK Amicus Br. __" are to pages in the Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner.

21. References to "Lodging __" are to pages in the Lodging submitted jointly to the Supreme Court by the parties.

(Mem.), is that shareholders opt to charter their corporation in a state to take advantage of the laws of that state, and it should therefore be presumed conclusively that all of the corporation's shareholders are citizens of that chosen state. Applying that same presumption to a corporation chartered in a British Dependent Territory means that the shareholders (regardless of where they actually resided) opted to incorporate in a jurisdiction whose people were *not* citizens of the United Kingdom. The conclusive presumption should therefore be that the corporation is not a United Kingdom citizen, but merely a national, just like its people.

We therefore need look no further than the British statute. The United Kingdom has decided under the British Nationality Act 1981 that certain of its people are neither citizens nor subjects, but instead fall into a class called "nationals" whom it protects and for whom it is internationally responsible. Under the plain language of the British statute, Petitioner's argument fails.

If the plain language of the British law were not compelling enough, then the evolution of that law provides irrefutable proof that the United Kingdom has, over time, reduced the status of its colonial residents to the point where they no longer are amenable to diversity jurisdiction. The United Kingdom has made clear in its *amicus* brief that it maintains today a set of internal distinctions between its nationals, just as it did over two centuries ago, but that the residents of its colonies are no longer citizens or subjects, even if they once had that status.

Before 1983, all Commonwealth Citizens were also British subjects. The British Nationality Act 1948 had created a status known as "British subject without citizenship", so that British subjects could be either citizens or non-citizens. *See* Immigration & Nationality Directorate, BN3: Information

About British Subject Status <http://www.ind.homeoffice.gov.uk/default.asp?PageId=147>. Under the 1948 statute, all Commonwealth Citizens (including the residents of colonies) would have been subject to alienage diversity jurisdiction because they were subjects, even though they lacked citizenship and therefore had no right of abode in the United Kingdom. Ian A. MacDonald & Nicholas J. Blake, MacDonald's Immigration Law and Practice in the United Kingdom 107 (3d ed. 1991). The British Nationality Act 1981 changed the legal landscape. It eliminated the general status of "British subject" and applied it instead to a limited class of persons, and also created new classes who were neither subjects nor citizens. Such is the status of Respondent. As explained in a leading treatise on British nationality law,

> The purpose of dividing up CUKCs [Citizens of the United Kingdom and Colonies in the British Nationality Act 1981] into what are in fact quite complicated sub-divisions is all to do with immigration and the attempt to create a British citizenship which automatically gives the right of abode in the UK. This, however, has only been achieved by separating off into different citizenships those former CUKCs who were not partial under the Immigration Act 1971.
>
> . . .
>
> On paper the category of British Dependent Territories citizen sounds like the creation of a new national unit parallel to that represented by British citizens. It is not. There is no common travel area matching what appears to be a common citizenship. Whereas British citizens have more

> or less free access to come and go to the UK, the 1981 Act gives no such right to British Dependent Territory citizens in Dependent Territory.

Id.

The United Kingdom's argument that it stands poised, in the near future, to change the status of colonial residents yet again to full citizens only lends weight to the argument that there is no alienage diversity jurisdiction over Petitioner's claims today. (UK Amicus Br. at 28). It also establishes that the United Kingdom, by its unilateral legislative act, can create a right of access to federal courts in the future.[22]

22. After the Petitioner's brief and the *amici* briefs were served, the bill to which it appears the United Kingdom refers indeed received the Royal Assent. The new law, entitled the British Overseas Territories Act 2002 makes it clear that, in the future, the United Kingdom will offer British citizenship to the current British Dependent Territories citizens. However, the day for that offer has not arrived, as the new law only becomes effective once the Secretary of State for the Foreign and Commonwealth Affairs declares a date of commencement. British Overseas Territories Act 2002, cl. 8(2) (available at <http://www.legislation.hmso.gov.uk/acts/acts2002/20020008.htm>). That date may not come soon, for it will only come about "once [Her Majesty's Government] are satisfied that the practicalities for implementation of the citizenship provisions are in place. For instance, we need to ensure that arrangements for passport issue are agreed and that the staff who will deal with passport and nationality questions are properly trained." 375 Parl. Deb., H.C. (5th ser.) 478-80 (2001) (remarks of Parliamentary Under-Secretary Of State For Foreign & Commonwealth Affairs Ben Bradshaw) <http://www.publications.parliament.uk/pa/cm200102/cmhansrd/cm011122/debtext/11122-10.htm>). Thus, the law is neither self-executing, nor does it mean that every British Virgin Islands citizen is automatically a citizen of the United Kingdom. Once the law commences, future diversity cases will need to be decided on a case-by-case basis, depending on whether the alien party has decided whether to accept or to renounce British citizenship. *Id.*

The United Kingdom further concedes that its citizenship statutes do not apply to corporations. (UK Amicus Br. at 12-13). Instead, that government refers again to the overall group of "nationals" and seeks to apply the law of nationality, rather than the law of citizenship or subjectship. For purposes of determining whether diversity exists, the fact that a British Virgin Islands corporation is a "United Kingdom national" (just as an English corporation would be a United Kingdom national) is merely the first step in the inquiry. If there were any analogy to the proceedings in the case of domestic corporations (and there is not, as explained in this Point above), then the next step would be to apply the conclusive presumption, contained in 28 U.S.C. § 1332(c)(1), that a corporation is deemed a citizen both of the jurisdiction of its place of incorporation and of its principal place of business. Under that rule, then, Respondent is deemed to be a "British Dependent Territories citizen" and would not be a British citizen for purposes of alienage diversity jurisdiction.

Finally, the second class status of United Kingdom colonials is amply shown by reference to the examples that the United Kingdom itself has offered to this Court. Each of the examples of a bilateral treaty cited by the United Kingdom is an instance in which the treaty would have been inapplicable to the colony at issue had the obligation merely been one between the United Kingdom and the United States. Instead, when the United States seeks to bind one of the United Kingdom colonies, it must negotiate with the United Kingdom for a separate agreement extending the treaty to the colony in question. One such example is the Treaty Concerning the Cayman Islands and Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S.-U.K., 26 I.L.M. 536 (1987). Treaties offer a mechanism whereby, through bilateral action, the United Kingdom can assure its colonial residents

access to the federal courts. There is no need to rewrite the alienage diversity statute by overruling the Second Circuit.

In sum, there is nothing novel or surprising about the need or desire of nations to decide who among their number "have the rights and privileges of citizenship", *see Schwarzkopf*, 137 F.2d at 903, and those who do not. The choices that those nations make, though, have consequences for the treatment of those persons under the statutes and treaties of the United States. In the case of the United Kingdom, its choices lead inexorably to the conclusion that its nationals who are neither British citizens nor subjects simply do not have access to the federal courts on the basis of alienage diversity jurisdiction.[23]

III.

THE POLICIES THAT LED CONGRESS TO CREATE ALIENAGE DIVERSITY JURISDICTION ARE NOT THWARTED BY A RULE REQUIRING COLONIAL RESIDENTS TO SUE AND BE SUED IN STATE COURTS

A. Domestic Policies Are Advanced By The Second Circuit's Rule.

The two policies identified by Petitioner as underlying diversity jurisdiction and alienage diversity jurisdiction are not implicated at all by this case. (Petitioner Br. at 25, 31).

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23. We have no quarrel here with the idea that there would be jurisdiction over a suit against any foreign national (assuming personal jurisdiction exists) involving a federal question under 28 U.S.C. § 1331. That issue is not presented in this case.

First, with respect to policy of preventing bias by domestic courts against foreigners, the argument is simply irrelevant. That policy is designed to protect the foreigner against the possible bias that the foreigner might suffer if forced to litigate in a state court. That is not an issue here because Petitioner, a New York corporation with its principal place of business in New York, is the party that opted for a federal forum. Respondent was the foreign defendant, so it would be the only party with cause to complain of anti-foreigner bias. Petitioner simply has no basis to invoke a claim of bias that Respondent does not advance.[24] Petitioner ignored the option of suing Respondent in Petitioner's home court and in the courts of the British Virgin Islands, opting

24. The policy argument of home-court bias would only be persuasive (if at all) in a case where a foreign plaintiff sued a domestic defendant in the defendant's home state. Such is not the case here. The bias argument is even weaker in the case of alienage diversity jurisdiction than it is in the case of domestic diversity jurisdiction because under alienage diversity jurisdiction the foreign party litigates in a United States courtroom against a domestic party. The argument of national bias (as opposed to home state bias) would apply with equal force regardless of whether the United States court were state or federal. Even if the Framers might have been thinking of a bias problem with respect to foreigners, then, their concern was plainly unfounded. A far more persuasive argument — which holds no vitality today — is that the newly-established federal courts could be relied upon to decide a critical subclass of cases (those concerning the collection of pre-Revolution debts owed to British loyalists) in favor of the foreigners, while state courts had demonstrated that they could not be relied upon to do so. Thus, two critical aspect of the 1783 Treaty of Paris (Article 4, relating to the recovery of bona fide debts, and Article 5, relating to restitution of property) depended for their success upon the availability of a forum to resolve legal issues. Indeed, Article 5 draws precisely the distinction at issue here, elevating the interests of "real British subjects" over those of "persons resident in districts in the possession on his Majesty's arms."

inexplicably to proceed in federal court despite plain Second Circuit authority that there was no subject matter jurisdiction.

Second, with respect to the policy of promoting the development of foreign commerce, the argument is inapposite because Britain, like every other colonial power, maintained a degree of exclusivity over trade with its colonies, taking them out of the usual stream of foreign commerce. (Petitioner Br. at 31). During the Revolution, for example, Congress included the West Indies colonies in their effort to restrain the trade in British goods. *See*, *e.g.*, 3 Journals of the Continental Congress 1774-1789 at 475-80 (G.P.O. 1905). After the War of 1812, the United Kingdom's act of closing its West Indies colonies to American trade vessels constituted a bitter point of contention between the two nations. *See*, *e.g.*, 5 American State Papers Foreign Relations 2-11, 12-13, 81-90, 226-240, 510; 6 American State Papers Foreign Relations 294-95, 963-85.

The Second Circuit's decision in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997) did nothing whatsoever to undercut the policies associated with alienage diversity jurisdiction. The Second Circuit's rule was a practical one. As an initial matter, the complaint itself must assert a basis for the exercise of subject matter jurisdiction. In *Matimak Trading*, as in this case, the plaintiff charged that the defendant was a citizen of something that, by any account, is not a "foreign State". Hong Kong was not a foreign state in 1996, nor is the British Virgin Islands a foreign state today. *Cf. Stuart v. City of Easton*, 156 U.S. 46 (1895) (Mem.) (dismissing, as insufficient to invoke alienage diversity jurisdiction, a complaint alleging that the defendant was a "citizen of London, England").

If there is to be any quarrel at all with the Second Circuit's opinion in *Matimak Trading*, it is surely one of style rather than substance. When it characterized the corporate and natural residents of the British Virgin Islands as "stateless", and thereby not entitled to invoke alienage diversity jurisdiction, it mischaracterized their status. Those persons are under the paternalistic protection of a state (the United Kingdom), but their state does not extend to them the full measure of rights of a citizen or subject. Since their rights are derivative of the British Crown, and dispensed by the Crown as a matter of grace, they are not automatically entitled to invoke the jurisdiction of federal courts, and they are instead required to have their claims heard in any of the fifty state courts with jurisdiction over both the person and the subject matter. The Court's conclusion, though — that the residents of Hong Kong occupied a nether region that simply did not rise to the level of being a "citizen" or "subject" — was exactly correct. It was in accord with principles of this nation's jurisprudence that stretch back to the earliest times.

Far from creating a category of statelessness which would (in Petitioner's words) "have been incomprehensible to the Framers" (Petitioner Br. at 14), the Second Circuit gave voice to a status with which the Framers were intimately familiar: colonial government in which political, economic and diplomatic power is wielded from afar, and a corresponding inability of the colonists to treaty with other nations for reciprocal advantage in trade and access to courts. The fact that the Framers had managed to fight for and win their own freedom did not change in any way the status of those West Indies colonists who chose not to fight the Crown, nor did it

change the political reality that only the Crown could treaty on behalf of its West Indies colonists.[25]

There is an additional set of policy implications to the alienage diversity rule that are promoted by a rule excluding foreign nationals who are neither citizens nor subjects.

First, the policy encourages immigration to the United States. The difference between American and British immigration policy was a consideration in the Congress that drafted the Alien Enemies Act. Albert Gallatin, who was a both a delegate to the Constitutional Convention and a Representative from Pennsylvania in the Fifth Congress, noted in his criticism of the bill that one of the Colonies' complaints against the King as expressed in the Declaration of Independence was that Britain had endeavored to suppress the population of the colonies, prevented foreigners from being naturalized and discouraged foreign migration to the American Colonies. 5 Annals of Congress 1983 (1798).

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25. Certainly with respect to the West Indies colonies, the Framers' experience was both unpleasant and different from the experience with the settlement colony in Canada. Our Continental Congress courted the favor of the Canadian colonists while pushing away those in the West Indies. *See* 2 Journals of the Continental Congress 1774-1789 at 68-70 (G.P.O. 1905) (entreating Canadians to resist British overtures and warning of risk of West Indies conflict). The Articles of Confederation therefore drew a plain distinction between the United States' policy toward Canada and that toward other colonies. Articles of Confederation, Art. XI ("Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.") To assume that Congress immediately decided to reverse its policy without receiving anything in return simply defies reason.

The Second Circuit's rule promotes the national policy because it confers an advantage on those colonial residents who would immigrate and thereby become citizens of the United States.

Second, the policy discourages the expatriation of United States businesses to offshore tax and bank havens. In this regard, the arguments of Petitioner and *amici* provide cogent evidence. United States corporations that surrender their domestic charters to reincorporate in tax havens such as the British Dependent Territories do so at no cost if they retain their ability to litigate in the federal courts.[26] Indeed, reincorporation abroad would actually increase the burden on the federal courts of diversity cases because it would be easier for the reincorporated entity to satisfy the complete diversity requirement in litigation against American citizens if the corporation were deemed to be a foreign citizen, rather than a citizen of one or two of the American states.

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26. The phenomenon of American corporations using the British Dependent Territories as havens to reincorporate and avoid United States taxes has recently become an important issue. *See, e.g.*, Susan Pulliam, Heard on the Street: Reincorporating Companies Find Bermuda A Place to Shed Some of Those Extra Taxes, Wall St. J. February 19, 2002, at A1 (citing exampies of 20 U.S. publicly-held corporations which have reincorporated in Bermuda to avoid U.S. tax on foreign-source income); John D. McKinnon, Questioning the Books: Congressional Probe to Examine Enron's Tax-Avoidance Strategies, Wall St. J., February 19, 2002, at A6 (citing example of Enron's use of tax haven subsidiaries in Cayman Islands and Bermuda); Organization for Economic Cooperation and Development, Towards Global Tax Cooperation 16-17 (2001) (listing British Virgin Islands as among those jurisdictions meeting criteria for harmful tax practices amounting to status as tax haven) <http://www.oecd.org/pdf/M000014000/M00014130.pdf>.

Third, the policy tends to discourage the development of criminal enterprises that affect the United States. The commerce-based argument offered by the Petitioners and *amici* amounts to an assertion that, because the British Dependent Territories are now important financial centers, their corporations should not be denied access to the federal courts for lack of diversity. (Petitioner Br. at 31; US Amicus Br. at 24; UK Amicus Br. at 3). That argument ignores the reason for why those territories became important financial centers in the first place. Each of them attracted a substantial number of banks in the early 1990s following the colonies' adoption of bank secrecy and tax laws that rendered the islands impervious to scrutiny by American taxing authorities, criminal enforcement authorities and civil litigants. The problem was highlighted by the United Kingdom's government in the White Paper that formed the basis for the policy in the new British Overseas Territories Act 2002:

> We shall also press Overseas Territory governments to introduce legislation to improve regulation of company formation and management because, for example, in the absence of proper regulation, complex company structures can be used to disguise the proceeds of crime and other regulatory abuse as well as providing limited liability. There is increasing evidence that companies, incorporated in an Overseas Territory but based elsewhere, have been used as vehicles to disguise money laundering and financial fraud. Company formation agents and company managers need to be required by law to hold key information about the companies for which they have responsibility and to disclose that information to a regulator on request. This will help

ensure a properly documented paper trail for criminal and regulatory investigations.

Secretary of State for Foreign and Commonwealth Affairs, Partnership for Progress and Prosperity: Britain and the Overseas Territories 72 (1999); *see also* Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples for 2000, U.N. GAOR, 55th Sess., Supp. No. 23, at 96-97, U.N. Doc. A/55/23 (2001) (noting need for cooperation to combat drug trafficking and money laundering in British Virgin Islands and Cayman Islands).

Since laws passed by the United Kingdom Parliament have no effect in those territories unless specifically provided, and since the treaty obligations of the United Kingdom do not automatically bind the territories, the United Kingdom's bilateral relationship with the United States has not improved the ability of the United States to root out financial fraud and narcotics trafficking in those territories. In the case of the British Virgin Islands, for example, the United States did not obtain a treaty on mutual legal assistance until 1990, *see* Treaty Relating to Mutual Legal Assistance Between the U.S. and the United Kingdom concerning the Cayman Islands, July 3, 1986, 26 I.L.M. 536 (entered into force as to British Virgin Islands November 9, 1990), it had to negotiate for that treaty separately from its treaties with the United Kingdom. By depriving the territories of automatic access to the federal courts, the United States retains an important incentive that can be traded by treaty with the United Kingdom (after the Senate consents) for closer scrutiny by the United States of transactions in the British Dependent Territories.

The argument advanced by Petitioner and *amici* that the Second Circuit's rule has an adverse impact on foreign trade is odd. (Petitioner Br. at 31). There is no trade at issue, except on paper. As Petitioner explains in the case of the British Virgin Islands, for example, each of the more than half million international business companies incorporated there (over 24 corporations for each man, woman and child[27]) is "required to conduct its business outside the British Virgin Islands." (Petitioner Br. at 31). The substantive transactions therefore occur either in other nations or in the United States. If a British Virgin Islands corporation were to reincorporate in the place of its principal place of business, then it could typically avail itself of either traditional alienage diversity jurisdiction or (in most instances) domestic alienage diversity.

B. There Is No Discriminatory Treatment of United Kingdom Citizens In This Policy.

The United Kingdom's argument that it suffers some discriminatory treatment without automatic access to federal courts rings hollow because the United Kingdom offers only a local court system to American litigants who have disputes with United Kingdom nationals. (UK Br. at 2). The United Kingdom lacks a federal system, so local courts — be they in the British Virgin Islands or in England — afford the only mechanism whereby a United States citizen can adjudicate claims against a United Kingdom national. The access to federal courts has no basis in a reciprocal advantage conferred on United States citizens by the United Kingdom, and therefore provides no equitable reason to fashi[illegible] a rule of access.

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27. The British Virgin Islands has an estimated population of 20,812 as of July 2001. CIA World Factbook 2001 <http://www.cia.gov/cia/publications/factbook/geos/vi.html>.

In particular, the basis for the United Kingdom's objection appears to be based upon a fundamental misunderstanding of our dual system of state and federal courts. The United Kingdom's two "Diplomatic Notes" appear to ignore the fact that British Dependent Territories citizens have recourse to our state courts. (UK Amicus Br. at 3-4). Those state courts, which have concurrent jurisdiction with the federal courts over civil actions with an appropriate amount in controversy, are certainly adept to resolve any disputes in which British Dependent Territories citizens become involved. If the dispute involves a federal question, then the federal courts are available as well.

In any event, it is insufficient for Petitioner that the statute should be interpreted so as to suit the desires of the United Kingdom when the text of both the United States law and the United Kingdom law command a different result. Thus, the State Department's plea to the Judiciary to extend jurisdiction in cases such as this is simply directed to the wrong forum, for the President, the United Kingdom government and the Congress hold the key to the relief that the State Department seeks. The United Kingdom holds the key to its fate in that it could unilaterally extend full British citizenship to all residents of Overseas Territories.[28] The President holds a key because he could agree with the United Kingdom, by treaty, to extend jurisdiction to those persons, subject to the advice and consent of the Senate. Finally, Congress holds a key in that it could amend the legislation in question, just as it did when issues of equity arose with respect to residents of the District of Columbia and territories. In each of those instances, though, the issue is plainly one that is committed to a co-ordinate branch of government, and should therefore not be addressed by this Court.

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28. As noted above, that key now sits in the hand of the United Kingdom's Secretary of State for Foreign and Commonwealth Affairs.

IV.

ADOPTION OF THE RULE PROPOSED BY THE PETITIONERS UNDERMINES THE INTERNATIONAL POLICY OF DECOLONIZATION

The United Nations Charter, to which both the United States and the United Kingdom are parties, has established a reporting requirement with respect to the treatment of non-self-governing territories (UN Charter, Article 73) in aid of a worldwide policy to eliminate the vestiges of colonialism and to provide for self-government.[29] In large measure, the efforts of Western nations to bring about self-government and decolonization have been successful, but there are exceptions. The two remaining nations with any substantial colonial power remain the United Kingdom and the United States. Without minimizing at all the supreme effort that the United Kingdom has made in the post-World War II era to decolonize, that nation's status as the leader among remaining colonial powers is beyond dispute.[30]

Regrettably, though, the vestiges of colonialism have been difficult to eradicate, primarily because two nations — the United States and the United Kingdom — have clung steadfastly to colonial possessions. Thus, in the most recently concluded session of the General Assembly, three resolutions

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29. *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15th Sess., 947th mtg.<http://www.un.org/Depts/dpi/decolonization/docs/res1514.htm>.

30. Of the world's seventeen remaining colonies, the United Nations credits the United Kingdom with responsibility for ten non-self-governing territories, and the United States with three, as of 1999. <http://www.un.org/Depts/dpi/decolonization/trust3.htm>.

carrying out the work of the United Nations' Fourth Committee[31] on colonization were carried overwhelmingly, over the negative votes of only the United Kingdom and the United States.[32]

While we do not quarrel with the power of the governments of the United States and the United Kingdom to declare their resistance to the international norm favoring decolonization, those governments cannot hide from the consequences of the policies which maintain a small number of people — the residents of their colonies — in a condition that lacks both internal and international political power. To the extent that the United Kingdom extends the offer of citizenship to its colonial people without giving them the opportunity to choose self-determination instead, then the alienage diversity puzzle will be solved, but to the detriment of the right of those people to determine their political destiny.

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31. The "Fourth Committee" is the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

32. Dissemination of Information on Decolonization, 55/145; Second International Decade for the Eradication of Colonialism, 55/146; Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 55/147; Press Release GA/9488 (Dec. 8, 2000) (reporting vote totals).

CONCLUSION

For all of the reasons set forth herein, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THE JPMORGAN CHASE BANK, formerly known as
THE CHASE MANHATTAN BANK,
as Indenture Trustee, under the Indenture,
dated as of May 6, 1998,

Petitioner,

v.

TRAFFIC STREAM (BVI)
INFRASTRUCTURE LIMITED,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Rule 29.6 Statement was set forth at page ii of Petitioner's Opening Brief, and there are no amendments to that Statement.

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Petitioner, The JPMorgan Chase Bank ("Chase"), formerly known as The Chase Manhattan Bank, submits this reply brief in further support of its appeal from the decision of the Second Circuit Court of Appeals which applied the holding of *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998) to the instant case and dismissed this action for lack of subject matter jurisdiction under 28 U.S.C. § 1332(a)(2).

In its opposing brief, Respondent Traffic Stream (BVI) Infrastructure Limited ("Traffic Stream") does not rely on the rationale the Second Circuit adopted in *Matimak*. Indeed, Respondent never argues that the British Virgin Islands ("BVI") is a stateless entity as the Second Circuit held. Instead, Traffic Stream effectively concedes that BVI is subject to the sovereign authority of the United Kingdom, but claims that unless a sovereign, here the United Kingdom, adopts a statute stating that an entity is a "citizen" or "subject" in those literal words, alienage jurisdiction cannot exist under the federal alienage diversity statute. In arguing this point, Traffic Stream misapplies the law of the United Kingdom, which shows that BVI residents and corporations are United Kingdom subjects, as well as the basic policies of alienage diversity jurisdiction and the plain meaning of the statute itself.

ARGUMENT

I. Traffic Stream Improperly Bases Its Analysis On A Misreading Of An Inapplicable Nationality Statute, Without Reference To The Applicable Law Of The United Kingdom Or The United States

A. The Meaning of the Terms "Citizen" and "Subject" Must Be Decided Under the Constitution and Law of the United States

The lynchpin of Traffic Stream's argument is its claim that under the British Nationality Act 1981, the people and corporations from the United Kingdom's Overseas Territories are not denominated "citizens" or "subjects" of the United Kingdom, and hence may not invoke alienage diversity

jurisdiction. (*See* Resp. Br.[1] at 5, 25-31).[2] The United Kingdom, as *amicus curiae*, has clearly shown that the British Nationality Act is inapplicable and that under applicable United Kingdom law, BVI residents and corporations are, without doubt, United Kingdom subjects. (UK Br. at 9-23). Traffic Stream is also wrong in its claim that an examination of foreign law alone can determine the scope of federal alienage jurisdiction, as the *amicus curiae* brief of the United States explains. (US Br. at 20-25). Judge Sotomayor cogently explained this point:

> None would argue with the notion that a foreign state is entitled to define what persons or entities fall into its categories of "citizen" or "subject," or any other of a variety of legal forms that exist under its own domestic immigration, nationality, and commercial law. The domestic meaning that any particular country may give to the terms "citizen" or "subject" does not, however, bind our courts in determining whether an individual or entity falls within the statutory meaning of such terms as provided by our law of alienage jurisdiction. The wide disparity in meaning that exists among countries concerning such terms requires that our alienage jurisdiction be determined not according to the appearance of the words "citizen" or "subject" (or translation thereof) in the pages of a country's domestic code, but according to whether United States law deems such persons or entities to be "citizens or subjects" under our Constitution and statutes for the purpose of alienage diversity jurisdiction.

Koehler v. Bank of Bermuda (N.Y.) Ltd., 229 F.3d 187, 190 (2d Cir. 2000) (Sotomayor, J., dissenting).

What is controlling is the meaning that Congress and the Constitution intended by their use of the terms "citizen" or "subject" and, in particular, what is meant by a "subject" of a foreign state. The *amicus* brief for the United States details the plain meaning of "subject" under United States law. As the brief states, a subject is one "who owes allegiance to a sovereign and is governed by that sovereign's laws." (US Br. at 9). In this case, as demonstrated by the positions of the United States, the United Kingdom, and BVI itself, it is clear that the residents and corporations of BVI are subjects of the United Kingdom. Traffic Stream presents no contrary authority and no alternative definition for the term "subject" under United States law.

The Court should look to the nature of the relationship between the United Kingdom and the residents and corporations of its Overseas Territories, and the indicia which show that the Overseas Territories are under the sovereignty of the United Kingdom, and, thus, its residents and corporations should be considered United Kingdom "citizens or subjects" for alienage jurisdiction purposes. Traffic Stream's opposition does not dispute the vast evidence which shows that the United Kingdom exercises sovereignty over the individuals and corporations that reside in its Overseas Territories. In fact, at various points, it even argues that the United Kingdom can bind BVI through treaty, a clear demonstration of sovereignty. (Resp. Br. at 30, 38, 40; *see also* Pet. Br. at 21-24; UK Br. at 13-26). It is this evidence, as a whole, that the Court must look to — and not simply the terminology in one inapposite domestic statute — in order to determine whether Traffic Stream is a subject of the United Kingdom.

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1. References hereinafter to "Resp. Br. __" are to pages in the Brief for Respondent. References hereinafter to "Pet. Br. __" are to pages in the Brief for Petitioner dated February 19, 2002. References to "US Br. __" are to pages in the Brief for the United States as Amicus Curiae Supporting Petitioner dated February 2002. References hereinafter to "UK Br. __" are to pages in the Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner dated February 19, 2002.

2. Traffic Stream never mentions the other statute the *Matimak* court relied on, the British Companies Act 1948, and, thus, has apparently disavowed any reliance on that statute. Both Chase and the United Kingdom have explained *Matimak*'s misinterpretation of the British Companies Act. (Pet. Br. at 18-19; UK Br. at 11-12).

B. Traffic Stream's Reliance on the British Nationality Act is Misplaced

As demonstrated in the United Kingdom's *amicus* brief, the British Nationality Act 1981 does not control the outcome of this case. That Act determines certain immigration and travel rights within components of the United Kingdom, and has nothing to do with the body of United Kingdom law governing the relationship between the United Kingdom, its Overseas Territories, and their inhabitants and corporations. (*See* UK Br. at 12-13, 27-28). Nonetheless, Respondent attempts to draw distinctions based on the language of the Nationality Act to determine whether natural persons and corporations are citizens or subjects of the United Kingdom for alienage jurisdiction purposes. Relying on these distinctions, Respondent reaches incorrect conclusions with respect to individuals as well as corporations.

Traffic Stream admits that the Nationality Act does not apply to corporations. (Resp. Br. at 26). Contrary to Respondent's assertion, the nationality of a corporation is derived from the laws under which it is incorporated, not the laws governing the nationality of natural persons resident in the place of incorporation.[3] *See, e.g.*, *Matimak*, 118 F.3d at 79, 85 ("[A] corporation is a 'citizen' or 'subject' of the entity under whose sovereignty it is created.") (citing *National Steamship*

3. Traffic Stream argues that the Nationality Act should be applied to corporations because the old federal law "domestic theory" of corporations espouses that the shareholders of a corporation are all presumed to be citizens of the state of incorporation. (Resp. Br. at 27). The "domestic theory," however, was criticized, and in 1958, Congress amended 28 U.S.C. § 1332 to specifically provide that a corporation would be deemed a citizen of both the state in which it was incorporated as well as the state in which it had its principal place of business. 28 U.S.C. § 1332(c)(1). Thus, the legal fiction of the "domestic theory" was replaced by a "greater recognition of local corporate activity as equivalent to citizenship for diversity purposes." *Taussig v. Wellington Fund, Inc.*, 187 F. Supp. 179, 190 (D. Del. 1960), *aff'd*, 313 F.2d 472 (3d Cir.), *cert. denied*, 374 U.S. 806 (1963). Traffic Stream cites to no United Kingdom law on this point.

Co. v. Tugman, 106 U.S. 118, 121 (1882); *Restatement (Second) of the Foreign Relations Law of the United States* § 26 (1965)). As explained in the brief for the United Kingdom, BVI corporations are creatures of United Kingdom law by virtue of the constitutional relationship between BVI and the United Kingdom. (*See* UK Br. at 13-18).

Moreover, although Traffic Stream purports to rely on the "plain language" of the Nationality Act in reaching the conclusion that residents and corporations from the Overseas Territories are not citizens or subjects of the United Kingdom, the language of the Act provides no basis for this conclusion. The Nationality Act does not purport to define the terms "United Kingdom citizen" or "United Kingdom subject." The statute does use the terms "British citizen," "British subject" and "British Dependent Territories citizens," but nowhere does it provide that any of these groups are or are not citizens or subjects of the United Kingdom. While Traffic Stream opines that British citizens and British subjects are the only groups that "are amenable to 28 U.S.C. § 1332(a)(2)" (Resp. Br. at 26), the statute itself provides no basis for this conclusion, and Traffic Stream has not cited any authority to support it. Thus, Traffic Stream's statement that the "plain language" of the Nationality Act demonstrates that the United Kingdom has determined that "certain of its people are neither citizens nor subjects" is unsupported. (Resp. Br. at 27).

The logical absurdity of premising a United States federal court's jurisdiction on a semantic distinction drawn in a foreign country's domestic nationality statute is further demonstrated in Traffic Stream's assertion that the United Kingdom, by its unilateral legislative act, can create and deny a right of access to federal courts in the future. (Resp. Br. at 29). Thus, Traffic Stream asserts that residents of BVI had access to federal courts from 1948 until 1981 when the British Nationality Act changed their label from British subjects to British Dependent Territories citizens (Resp. Br. at 28) and that they may again have such access once the newly-enacted legislation granting "British

citizenship" to Overseas Territories citizens goes into effect. (Resp. Br. at 29 n.22). This argument ignores the reality of the United Kingdom's sovereignty over BVI, namely its method of governance, the treaties and conventions adopted on its behalf, the right to veto legislation, the judicial practice and appeal process and the United Kingdom's obligation to defend BVI and its residents. Those factors are what the United States looks to in determining whether sovereignty exists, not semantics.[4]

II. The Framers Of The Constitution's Alienage Diversity Clause And The Drafters Of The Alienage Diversity Statute Authorized Federal Jurisdiction Over The Present Suit

A. The Framers Intended the Terms "Citizens" or "Subjects" in Article III's Alienage Diversity Clause to Refer to All Those Who Owe Allegiance to, and Are Under the Protection of, a Foreign State

Traffic Stream asks this Court to construe the words "citizens" or "subjects" in a manner inconsistent with the historical understanding of those terms at the time the Constitution was adopted. "As an historical matter, the drafters of the Constitution chose the words 'citizens' or 'subjects' to refer to the broad category of those under the authority of a foreign power." *See Koehler*, 229 F.3d at 191 (Sotomayor, J.,

4. As Judge Sotomayor wrote in discussing the perils of an over-technical reading of foreign law:

> The reasoning of *Matimak* applied to all foreign corporations would produce an absurd result. The term "national" is often used instead of "citizen" or "subject" to describe the identity of a foreign corporation. If indeed courts must rely solely on the words found in the domestic codes of other countries and there we discover that corporations are referred to only as "nationals" and not as "subjects" or "citizens" of a particular country, the *Matimak* analysis would force us to deny them access to the federal courts.

Koehler, 229 F.3d at 193 n.13 (Sotomayor, J., dissenting) (citation omitted).

dissenting) (citing *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.), *overruled in part on other grounds by Louisville, Cincinnati & Charleston R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844)). In choosing these words, the Framers incorporated into the Constitution the commonly understood principle of that time that the word "subject" included all persons who owe allegiance to, and are under the authority of, a sovereign government. (*See* US Br. at 15 n.11 (citing several English language dictionaries and other sources that defined the term "subject" during the relevant time period)). The Framers also included the word "citizen" in the alienage diversity clause, but the term "citizen" as understood at the time was "precisely analogous to the term 'subject'" under English common law. *United States v. Wong Kim Ark*, 169 U.S. 649, 664 (1898).

Traffic Stream inaccurately asserts that the Framers had no fixed or definite notion of the meaning of the terms "citizens" or "subjects." This Court has repeatedly stated that the Constitution "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution." *Wong Kim Ark*, 169 U.S. at 654; *Schick v. United States*, 195 U.S. 65, 69 (1904); *Smith v. Alabama*, 124 U.S. 465, 478 (1888) (stating that the "interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in light of its history"). The fundamental principle of English common law at the time the Constitution was adopted was that anyone born in the British Empire (including the British colonies) was considered a British subject. This fundamental principle was clearly stated by Sir Edward Coke in *Calvin's Case*, 77 Eng. Rep. 377, 407 (1608) (finding that whosoever was born under the King of England's power or protection was considered a subject of England).

The English common law embraced this fundamental notion. *See Wong Kim Ark*, 169 U.S. at 656 (citing numerous

examples of English authorities that followed the ruling and reasoning of *Calvin's Case* with respect to this notion). For example, Lord Blackstone concluded in his *Commentaries on the Laws of England* that "[n]atural-born subjects are such as are born within the dominions of the crown of England." 1 Sir William Blackstone, *Commentaries on the Laws of England* 372 (1813 ed.).[5] After an extensive examination of English common law with respect to the definition of the term "subject" at the time of the Constitution, this Court also confirmed that "every person born within the dominions of the crown . . . was an English subject" except for "the children of foreign ambassadors, . . . or a child born to a foreigner during the hostile occupation of any part of the territories of England." *Wong Kim Ark*, 169 U.S. at 657 (quoting Sir Alexander James Edmund Cockburn, *Nationality* 7 (1869)).

Traffic Stream attempts to confuse this relatively straightforward application of the English common law by introducing the concept of volitional allegiance and arguing that the American view of subjectship was in constant flux at the time the Constitution was adopted. The American view of volitional allegiance that developed in the Revolutionary era is irrelevant to the determination of the meaning of the term "subject." "Allegiance is the tie, or ligamen, which binds the subject to the king, in return for that protection which the king affords the subject." 1 Blackstone, *supra*, at 372. Under the American view of volitional allegiance developed during the American Revolution, a government has an affirmative obligation to protect the fundamental rights of its subjects, and if a government fails in this obligation, its subjects no longer owe any allegiance to the government. *See* James H. Kettner, *The Development of American Citizenship, 1608-1870* at 173-209 (1978). This developing view of allegiance contrasted with the traditional English view of perpetual allegiance (once a subject always a subject). *Id.* at 44-61.

5. "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." *Schick*, 195 U.S. at 69.

The emergence of this new political theory of volitional allegiance, however, did not alter or destroy the underlying common law meaning of the term "subject." The concept of allegiance refers only to the rights and obligations possessed by a subject of a particular government, not the underlying definition of the term "subject." It is true that, under the American view, subjects can voluntarily renounce their subjectship and therefore change their status as subjects. *Id.* at 173-209. However, there is no evidence that any of the United Kingdom's Overseas Territories have chosen to renounce their subjectship as the Americans did in the Declaration of Independence. In fact, BVI, the Overseas Territory specifically at issue in the present case, has confirmed that its residents and corporations are subject to the sovereignty of the United Kingdom. The Attorney General for BVI, Cherno S. Jallow, issued a statement, dated February 3, 2000, that fully supports the conclusion that residents and corporations of BVI are subjects of the United Kingdom. *See* L 35-36[6] ("On behalf of the Government of the British Virgin Islands, I fully support the arguments and conclusions presented in the Brief of the United Kingdom."). Accordingly, Respondent's discussion of allegiance is inapplicable to the present case.

Moreover, Traffic Stream's suggestion that the Framers intended the basic and fundamental underlying meaning of the term "subjects" in the alienage diversity clause to be flexible, fluid and adaptable to accommodate any change in notions of the relation between individual and state is simply incorrect. Contrary to Traffic Stream's assertion, the meaning of the term "subject" has remained relatively constant throughout American constitutional history. In 1830, Justice Story recognized that the "rule commonly laid down in the books is, that every person who is born within the ligeance of a sovereign is a subject[.]" *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting). This Court also recognized,

6. References to "L __" are to pages in the Lodging filed with the Supreme Court.

over one hundred years after the Constitution was adopted, that "we are, equally with the inhabitants of all other countries, 'subjects,' for we are equally bound by allegiance and subjection to the government and the law of the land." *Wong Kim Ark*, 169 U.S. at 665 (quoting 2 James Kent, *Commentaries on American Law* 258 n.b. (6th ed. 1848)). The term "subject" even retains its original meaning in modern sources and authorities and includes any person or entity that "owes allegiance to a sovereign and is governed by that sovereign's laws." *See Black's Law Dictionary* 1438 (7th ed. 1999); *see also* US Br. at 9 n.2 (citing several common dictionary definitions of "subject" at various periods of time).

B. Congress Drafted the Alienage Diversity Statute to Extend Alienage Jurisdiction to the Limits of the Constitution

The origin and history of the alienage diversity statute establishes that the underlying meaning of the terms "citizens" and "subjects" as applied to alienage diversity jurisdiction remained constant since the adoption of the Constitution. The alienage diversity statute has consistently granted federal courts jurisdiction over suits between a citizen of a state and those under the authority of a foreign state. Contrary to Traffic Stream's confusing arguments and assertions, that grant of federal jurisdiction extends to suits between citizens of a State and corporations existing under the laws of the United Kingdom's Overseas Territories.

As set forth in the *amicus* brief of the United States, Congress codified Article III's grant of alienage diversity jurisdiction through a series of statutory enactments. (US Br. at 16-20). Congress intended the language employed in each of these enactments to be synonymous with the terms "citizens" or "subjects" of a foreign state as understood by the Framers of the Constitution. The specific language Congress used in codifying alienage diversity jurisdiction therefore supports the conclusion that the Framers intended the terms "citizens" or "subjects" of a foreign state to include any person under the

sovereign authority of a foreign state. Traffic Stream cites no valid authority to the contrary.

Despite essentially conceding that Congress intended to extend alienage diversity jurisdiction under the Judiciary Act of 1789 to all aliens (Resp. Br. at 13), Traffic Stream erroneously asserts that the domestic treatment of Native Americans and residents of the District of Columbia and the American territories for diversity purposes somehow suggests that Congress also intended to exclude residents of foreign territories when it enacted the Judiciary Act of 1789. The treatment of Native Americans and residents of the District of Columbia and the American territories is immaterial to the present issue because alienage and diversity jurisdiction "should be treated as analytically distinct." *See* Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 5 (1996).

Diversity jurisdiction extends only over controversies between "citizens of different States." 28 U.S.C. § 1332(a)(1). Obviously, residents of the District of Columbia and the American territories were not considered citizens of any particular state at the time, so they initially could not invoke diversity jurisdiction. *See Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1805); *Corporation of New-Orleans v. Winter*, 14 U.S. (1 Wheat.) 91, 94 (1816). Native Americans, because of their quasi-sovereign status, likewise were not "citizens" of any state and therefore were not amenable to diversity jurisdiction. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987). The determination that Native Americans and the residents of the District of Columbia and the American territories were not "citizens" of any State has no bearing on Congress' understanding of the terms "citizens" or "subjects" of a foreign state.

Traffic Stream asserts that the enactment of the Alien Enemies Act of 1798 somehow demonstrates that Congress recognized inherent class distinctions in the treatment of foreign

nationals and that some foreign nationals were not considered by Congress to be "citizens" or "subjects" of a foreign state. The rationale for the Alien Enemies Act is radically different than that underlying the alienage diversity statute. The Alien Enemies Act was enacted to include within its ambit all individuals who might be likely to favor a hostile nation or government because of ties of nativity or allegiance, and therefore commit acts dangerous to the public safety of the United States if allowed to remain at large. *United States ex. rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 902 (2d Cir. 1943). It was necessarily broader than the alienage diversity section of the Judiciary Act of 1789 for national security reasons because it was intended to apply to all individuals who had any ties to a hostile nation, even those who might not be considered a "citizen" or "subject" of a foreign state. *Id.*; *see, e.g.*, *Ex parte Gregoire*, 61 F. Supp. 92 (N.D. Cal. 1945) (French citizen subject to removal during World War II because he was born in Germany). The Alien Enemies Act is therefore inapplicable and sheds no light on the proper interpretation of the Judiciary Act of 1789.

Traffic Stream, without any support, asserts that there is not "a long-standing line of cases in which the residents of [United Kingdom Overseas Territories] had routinely sued and been sued in federal courts on the basis of alienage diversity jurisdiction." (Resp. Br. at 24). This is wrong. Within the fifteen years prior to the *Matimak* decision alone, there have been at least forty reported decisions in federal courts where one of the parties was a resident or corporation of a United Kingdom Overseas Territory and the court stated that jurisdiction was based on diversity. These are presumably only a fraction of the total cases filed since many cases generate unpublished decisions or no decisions at all.[7]

7. *See, e.g.*, *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 45 n.4 (2d Cir. 1996) (BVI plaintiff); *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1106-07 (10th Cir. 1991) (Bermuda plaintiff); (Cont'd)

(Cont'd)
Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1209-10 (3d Cir.), *cert. denied*, 502 U.S. 908 (1991) (Bermuda defendant); *Koteen v. Bermuda Cablevision, Ltd.*, 913 F.2d 973, 974 (D.C. Cir. 1990) (Bermuda defendant); *Centurion Reinsurance Co. v. Singer*, 810 F.2d 140, 142 (7th Cir. 1987) (Cayman Islands plaintiff); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 39-40 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987) (Bermuda plaintiff); *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1395 (9th Cir. 1986) (Cayman Islands defendant); *Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.*, 719 F.2d 992, 994-95 (9th Cir. 1983) (Bermuda plaintiff); *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731, 735 (2d Cir. 1983) (Bermuda plaintiff); *Meritxell, Ltd. v. Saliva Diagnostic Sys., Inc.*, No. 96 Civ. 2759 (JFK), 1997 WL 411466 at *1 (S.D.N.Y. July 18, 1997) (Gibraltar plaintiff); *Signal Mut. Indem. Ass'n v. Rice Mohawk U.S. Constr.*, No. 95 Civ. 3721 (LMM), 1996 WL 337294 at *1-2 (S.D.N.Y. June 19, 1996) (Bermuda plaintiff); *Maleski v. Conning & Co.*, No. Civ. A. 94-7507, 1995 WL 570466 at *1 (E.D. Pa. Sept. 27, 1995) (Bermuda defendant); *Gordon v. Long Bay (1980) Ltd.*, No. 94 Civ. 2141 (SHS), 1995 WL 489474 at *1 (S.D.N.Y. Aug. 16, 1995) (BVI defendant); *Leslie v. Construcciones Aeronauticas*, 896 F. Supp. 243, 245-47 (D.P.R. 1995) (BVI plaintiff); *One Hundred Pearl Ltd. v. Vantage Sec., Inc.*, 887 F. Supp. 636, 637-38 (S.D.N.Y. 1995) (BVI plaintiff); *Whitehouse v. Ruedlinger*, No. 92-4255-RDR, 1994 WL 113986 at *1-2 (D. Kan. Mar. 31, 1994) (Bermuda defendant); *Forest Ins., Ltd. v. American Motorists Ins. Co.*, No. 89 Civ. 4326 (BN), 1994 WL 97138 at * 1 (S.D.N.Y. Mar. 21, 1994) (Bermuda plaintiff); *Insurance Co. of N. Am. v. Pyramid Ins. Co. of Bermuda Ltd.*, No. 92 Civ. 1816, 1994 WL 88701 at *1 (S.D.N.Y. Mar. 16, 1994) (Bermuda defendant); *Pope v. Crandall*, No. 93 C 3061, 1994 WL 55731 at *1 (N.D. Ill. Feb. 22, 1994) (Bermuda defendant); *Harper-Wyman Co. v. In-Bond Contract Mfg., Inc.*, No. 93 C 2992, 1994 WL 22321 at *1-2 (N.D. Ill. Jan. 24, 1994) (Cayman Islands defendant); *N.F.L. Ins. Ltd. v. B & B Holdings, Inc.*, No. 91 Civ. 8580 (PKL), 1993 WL 78090 at *1, 9 (S.D.N.Y. Mar. 18, 1993) (Bermuda plaintiff); *Stephens v. American Risk Mgmt., Inc.*, No. 89 Civ. 2999 (JSM), 1993 WL 43494 at *2, 8 (S.D.N.Y. Feb. 18, 1993) (Bermuda and Cayman Islands defendants); *P.W. Stephens Contractors, Inc. v. Mid Am. Indem. Ins. Co.*, 805 F. Supp. 854, 856 (D. Haw. 1992) (Cayman Islands defendant); *Good Humor Corp. v. Popsicle* (Cont'd)

(Cont'd)

Japan K.K., 810 F. Supp. 1001, 1003 (E.D. Wis. 1992) (BVI defendant); *Standard Steamship Owners' Prot. & Indem. Ass'n (Bermuda) v. C&G Marine Serv., Inc.*, Civ. A. No. 92-0144, 1992 WL 111186 at *1-2 (E.D. La. May 13, 1992) (Bermuda plaintiff); *Dominick & Dominick, Inc. v. George Town Sec., Ltd.*, No. 91 Civ. 4080 (CSH), 1992 WL 88200 at *1-2 (S.D.N.Y. Apr. 17, 1992) (Cayman Islands defendants); *Milgrim Thomajan & Lee P.C. v. Nycal Corp.*, 775 F. Supp. 117, 118 (S.D.N.Y. 1991) (Bermuda defendant); *Heyman v. Massler*, No. 84 Civ. 888 (BN), 1991 WL 125259 at *1 (S.D.N.Y. June 28, 1991) (Gibraltar plaintiff); *Bruemmer v. Marriott Corp.*, No. 90 C 4190, 1991 WL 30141 at *1-2 (N.D. Ill. Mar. 4, 1991) (Bermuda defendant); *Charles Ulmer, Inc., Sailmakers v. Van Ost*, No. 89 Civ. 7897 (SWK), 1991 WL 29277 at *1 (S.D.N.Y. Feb. 26, 1991) (BVI defendant); *Lama Holding Co. v. Shearman & Sterling*, 758 F. Supp. 159, 160 (S.D.N.Y. 1991) (BVI plaintiff); *Banco Nominees Ltd. v. Iroquois Brands, Ltd.*, 748 F. Supp. 1070, 1071, 1077 (D. Del. 1990) (Bermuda plaintiffs); *Clarendon Group, Ltd. v. Smith Labs., Inc.*, 741 F. Supp. 1449, 1450-52 (S.D. Cal. 1990) (Bermuda plaintiff); *International Capital Equip., Ltd. v. Computer Atlanta, Inc.*, 715 F. Supp. 371, 371-72 (N.D. Ga. 1989) (Bermuda plaintiff); *Fireman's Fund Ins. Co. v. Fraund*, No. 88 Civ. 2765 (MBM), 1989 WL 31490 at *1 (S.D.N.Y. Mar. 31, 1989) (Bermuda defendant); *National Union Fire Ins. Co. of Pittsburgh v. Walton Ins. Ltd.*, 696 F. Supp. 897, 898, 902 (S.D.N.Y. 1988) (Bermuda defendant); *International Minerals & Chem. Corp. v. Cotia Comercio Exportacao E Importacao S.A.*, No. 85 Civ. 5763 (MJL), 1988 WL 42165 at *1 (S.D.N.Y. Apr. 26, 1988) (Cayman Islands defendant); *Young v. Pannell Fitzpatrick & Co.*, 641 F. Supp. 581, 583-85 (D.P.R. 1986) (BVI defendant); *Detroit Bank & Trust Co. of Detroit v. Trust Co. of the Virgin Islands, Ltd.*, 644 F. Supp. 444, 446, 450 (D.P.R. 1985) (BVI defendant); *Credit Life Ins. Co. v. Uniworld Ins. Co.*, 94 F.R.D. 113, 113-14 (S.D. Ohio 1982) (Bermuda defendant); *see also I. Oliver Engebretson, Inc. v. Aruba Palm Beach Hotel & Casino*, 587 F. Supp. 844, 846, 848 (S.D.N.Y. 1984) (Aruba and Netherlands Antilles defendants).

III. Denial Of Alienage Jurisdiction To Residents And Corporations From The United Kingdom's Overseas Territories Vitiates The Primary Reasons For Such Jurisdiction

A. Traffic Stream Incorrectly Asserts that the Underlying Reasons for Alienage Jurisdiction are Not Present

It is uncontroversial, and well documented, that the twin policy reasons behind the Framers' inclusion of alienage diversity jurisdiction were to prevent foreign entanglements and to promote commerce with foreign nations. (*See* Pet. Br. at 10-14; US Br. at 12-16; Resp. Br. at 13 n.11 ("The foreign entanglements justification and the commerce justification are old and familiar.")) Yet, despite recognizing that these policies are "old and familiar", Traffic Stream then attempts to escape the inevitable fact that they are indeed implicated by the Second Circuit's decisions in *Matimak* and the cases that followed *Matimak*, including this case.

Traffic Stream alters the foreign entanglement concern by reclassifying it as a policy of preventing bias against foreigners and to a certain extent arguing that any sovereignty exercised by the United Kingdom should be discounted because it is an invalid "colonial" power. The latter argument may be summarily rejected. First, the policies of a foreign state, once the state is recognized by the United States, are irrelevant to the issue of preventing entanglements with it. Second, it ignores the reality, as the United Kingdom has made clear, that the Overseas Territories will retain their connection to the United Kingdom only so long as they choose to do so. *See* Secretary of State for Foreign and Commonwealth Affairs, *Partnership for Progress and Prosperity: Britain and the Overseas Territories* 4, 12 (March 1999).

The bias argument is equally fallacious. The Framers' policy of prevention of entanglements led to allowing foreigners to sue and be sued in a federal forum which would be perceived as neutral so that foreign governments would not be hostile to the

United States as a result of perceived unfair treatment of their subjects. The policy was not and is not dependent on the position of the litigant in any action. Thus, Traffic Stream's assertion that it is the only party who can validly assert the entanglement issue confuses the "bias" argument in regular diversity cases with the entanglement issue in alienage jurisdiction, where the concern is the offending of a foreign sovereign, not bias in an individual case. *See* Johnson, *supra*, at 6, 20, 31 (noting that the mere perception of bias, alone, can have an impact on foreign relations, and that this influenced the Framers to create alienage diversity jurisdiction). In short, the issue of whether residents and corporations of the United Kingdom's Overseas Territories may sue or be sued in federal court under alienage jurisdiction is much larger than Traffic Stream's individual preference,[8] as is shown by the United Kingdom's and United States' participation in this matter as *amici*.

Traffic Stream's assertion that the promotion of commerce policy is not present in this case is inexplicable. Traffic Stream attempts to carve out a hitherto unsuspected exclusion to that conceded policy based on the erroneous assumption that the

8. Traffic Stream's newfound preference for state court, presumably because it would further delay its ultimate liability, should be disregarded by this Court. Prior to the Second Circuit raising the issue, Traffic Stream consented to jurisdiction in the federal courts, which belies its statement that there was "plain Second Circuit authority that there was no subject matter jurisdiction." (Resp. Br. at 32-33). The reality is that at the time this action was filed, in 1999, the Second Circuit's authority was far from "plain" because: (1) there were numerous cases upholding jurisdiction including the recent Second Circuit decision involving a BVI party (*Peregrine Myanmar Ltd.*, 89 F.3d at 45 n.4); (2) *Matimak* involved an arguably *sui generis* situation in that Hong Kong was in a state of flux because it was about to be returned to China; and (3) *Matimak* had been roundly criticized by commentators (*See* Pet. Br. at 8 n.7 (listing articles critical of *Matimak*)). The Second Circuit, itself, did not indicate that it would apply *Matimak* to other United Kingdom Overseas Territories until it decided *Koehler v. Bank of Bermuda (N.Y.) Ltd.*, 209 F.3d 130 (2d Cir. 2000), after the complaint in this action had been filed and summary judgment granted. (*See* JA 7a-24a).

Framers disregarded Caribbean or "colonial" trade. There is no basis for such an assertion. The Caribbean islands, which at that time consisted of colonies of various European states, were important trading partners of the United States given their proximity to the United States. *See*, *e.g.*, John C. Miller, *The Federalist Era 1789-1801* at 220-21, 227 (1960) (during the undeclared war with France in the late 1790s Great Britain protected American shipping in the Caribbean and relaxed its laws of "Trade and Navigation" to open its colonies to American trade). The Framers were concerned with promoting commerce, whatever the source. *See* Jonathan Shafter, *Original Intentions and International Reality: States, Sovereignty, and the Misinterpretation of Alienage Jurisdiction in Matimak v. Khalily*, 39 Colum. J. Transnat'l L. 729, 746-47 (2001) (concluding, based on the later writings of Alexander Hamilton, that "the Framers were not concerned with whether or not the source of that capital was the citizen or subject of a recognized sovereign state"). Today, there is significant trade between the United States and the United Kingdom's Overseas Territories, and the impact of denying such foreign entities access to federal courts is significant. (*See* Pet. Br. at 31-33, US Br. at 24-25).

B. Traffic Stream's Alternative Policy Concerns Are Not Valid

Traffic Stream attempts to assert several new policies that it claims are implicated by this case. None of them has merit.

First, Traffic Stream asserts that a policy consideration of the Framers in drafting the alienage diversity jurisdiction provisions of the Constitution and the Judiciary Act was the promotion of immigration. The only authority for this novel argument is an obscure reference by one delegate made in protest to the passage of an entirely different statute with entirely different purposes, the Alien Enemies Act.[9] (Resp. Br. at 35) (*see also* discussion, *supra*, at 11-12). There is no evidence

9. Indeed, it is clear that some of the Framers opposed immigration. "Benjamin Franklin, for example, was well known for deriding German immigration to Pennsylvania. . . ." Johnson, *supra*, at 15.

whatsoever that the promotion of immigration was a primary policy reason for alienage diversity jurisdiction.

Second, Traffic Stream argues that the rule in *Matimak* would help prevent expatriation of United States businesses to the United Kingdom's Overseas Territories, which Traffic Stream characterizes, based on hearsay newspaper articles, as offshore tax and bank havens. (Resp. Br. at 36). The undisputed record in this case reveals that Traffic Stream is not an expatriated United States business, but rather a BVI corporation that through its subsidiaries builds and operates toll road projects in China. (JA 9a). Leaving aside the lack of any record on this point, Traffic Stream's argument seems to be that such former United States corporations should lose their ability to litigate in the federal courts because they are now incorporated in purported tax havens. It goes without saying that this is ultimately a policy decision for Congress.[10]

Third, Traffic Steam apparently believes that this Court should rewrite the Judiciary Act in order to deny alienage diversity jurisdiction to the residents and corporations of the United Kingdom Overseas Territories as a means to punish these areas because they allegedly help foster unspecified criminal enterprises, or alternatively to use the withholding of such jurisdiction as an incentive for a treaty with the United Kingdom to force greater scrutiny of commercial transactions in BVI. (Resp. Br. at 38). There is no authority for such a breathtaking proposition, nor is there any factual predicate on this record or otherwise for such unsupported statements about alleged

10. Legally Traffic Stream's argument is not well founded. A corporation, for diversity purposes, will be deemed a citizen of the state in which it is incorporated, as well as the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1). Although there is a split in authority, some courts have held that for purposes of determining diversity jurisdiction, a foreign corporation with a principal place of business in the United States will be considered a citizen of both the foreign country and the United States state. *Jerguson v. Blue Dot Inv., Inc.*, 659 F.2d 31, 35 (5th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982); *Clifford Corp., N.V. v. Ingber*, 713 F. Supp. 575, 576-77 (S.D.N.Y. 1989).

criminal enterprises.[11] Even if such concerns exist, this is clearly an area for Congress and the executive branch to address, not the Court. *See Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)).

Traffic Stream also levels a general criticism at BVI's International Business Corporations ("IBCs") and claims that such companies should reincorporate in the country or U.S. State where they have a primary place of business. Once again, Traffic Stream would have this Court make a jurisdictional determination based on a perceived foreign policy goal. In the jurisdictional context, courts have long held that it is not their task to judge the propriety of the entities (corporate or otherwise) that another nation may recognize as its citizen or subject. *See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*, 917 F.2d 278, 285 (7th Cir. 1990) (recognizing that the Church was a distinct juridical entity under the laws of Cyprus and thus a "citizen or subject" of that state); *Cohn v. Rosenfeld*, 733 F.2d 625, 630 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984) (holding that Liechtenstein regarded its *anstalts* as juridical entities and that "[a]ny further limitation on the standing of these 'citizens or subjects' of foreign states would involve judicial encroachment on the sovereignty of the nation that formed them."); *cf. People of Puerto Rico v. Russell & Co., Sucesores*, 288 U.S. 476, 481-82 (1933) (concluding that entities created under Puerto Rican law known as *sociedades en comandita* were "juridical persons" that had the right to contract, own property and transact business).

11. BVI does not have bank secrecy laws (Financial Action Task Force on Money Laundering, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* 3, 15 (June 22, 2000)) and is a well-recognized common law jurisdiction which the world's capital markets rely upon for its well-established legal system and corporate law in raising investment for entities such as Traffic Stream who might not otherwise have access to the capital markets.

Finally, Traffic Stream appears to believe that the Second Circuit's decision should be upheld in furtherance of the "international policy of decolonization." (Resp. Br. at 41-42). In making such a claim, Respondent asserts that the United States and the United Kingdom "cannot hide from the consequences" of policies which allegedly keep BVI residents in a condition lacking internal and international power. These remarks demonstrate Respondent's utter misconception of the conceptual framework on which alienage jurisdiction rests, namely whether an entity is subject to the sovereignty of a foreign state. At the end of the day, even Traffic Stream does not deny that BVI residents and corporations are subject to the United Kingdom's sovereignty. It is thus clear they fall within the meaning of the alienage diversity statute.

CONCLUSION

For all the reasons set forth herein and in Petitioner's initial brief and in the briefs of its *amici curiae*, the decision of the United States Court of Appeals for the Second Circuit should be reversed, and the matter remanded to the Second Circuit for a decision on the merits of Traffic Stream's appeal.

Dated: April 10, 2002

Respectfully submitted,

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In the Supreme Court of the United States

CHASE MANHATTAN BANK, PETITIONER

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether corporations organized under the laws of United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of alienage diversity jurisdiction under 28 U.S.C. 1332(a)(2).

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In the Supreme Court of the United States

No. 01-651

CHASE MANHATTAN BANK, PETITIONER

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Article III of the Constitution extends the judicial power of the United States to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. Art. III, § 2, Cl. 1. Congress, in turn, has enacted the alienage diversity statute, which grants federal district courts jurisdiction over civil actions in which the matter in controversy exceeds $75,000, exclusive of interest and costs, and the action "is between * * * citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. 1332(a)(2). Congress enacted that statute to ensure, consistent with Article III, that private international disputes between United States citizens and foreign citizens or subjects, involving substantial amounts in controversy, may be resolved in federal judicial fora.

The United States has a significant interest in the correct interpretation of the alienage diversity statute because that grant of jurisdiction facilitates international commerce and because misapplication of that statute could have significant foreign policy ramifications. The alienage diversity statute gives foreign nations assurance that civil actions between their citizens or subjects and United States citizens may be resolved in a neutral national forum. The court of appeals' construction of that statute has led, on the other hand, to repeated and well-founded objections from an important ally, the United Kingdom, that the court has improperly denied subjects of the United Kingdom access to an important federal forum for resolving international commercial disputes. Relations between the United States and a number of other countries with dependent territories and possessions—including France, the Netherlands, Australia, New Zealand, Norway and Denmark—could also be affected. The United States is keenly interested in ensuring that the alienage diversity statute is interpreted in a manner consistent with congressional intent. That interpretation encourages foreign nations to afford United States citizens reciprocal access to foreign courts.

STATEMENT

Petitioner Chase Manhattan Bank sued respondent in the United States District Court for the Southern District of New York for breach of an indenture agreement providing for the issuance of secured debt to finance respondent's business ventures. See Pet. App. 15a-16a. The district court granted summary judgment in favor of petitioner, allowed foreclosure on collateral valued at more than $49 million, and entered a deficiency judgment of more than $98 million. See *id.* at 8a, 13a, 15a-16a, 54a. The court of appeals reversed that decision and ordered the district court to dismiss the action for lack of subject matter jurisdiction in light of the

court of appeals' prior decision in *Matimak Trading Co.* v. *Khalily*, 118 F.3d 76 (2d Cir. 1997), cert. denied, 522 U.S. 1091 (1998). Pet. App. 1a-7a. The court of appeals concluded that the district court improperly exercised jurisdiction under the alienage diversity statute, 28 U.S.C. 1332(a)(2), because respondent, which is a corporation organized under the laws of a United Kingdom Overseas Territory, is not a "citizen[] or subject[] of a foreign state." Pet. App. 7a.[1]

1. Petitioner is a United States bank, incorporated under the laws of the State of New York, that engages in domestic and international financing. Respondent is a foreign corporation organized under the laws of the British Virgin Islands. Petitioner and respondent entered into an indenture agreement under which respondent issued notes, secured by collateral, in the aggregate amount of $119,000,000. The notes were issued to finance the activities of respondent's four Hong Kong subsidiaries, which engage in joint ventures for road construction projects in China. Respondent agreed to make regular repayments on the notes to petitioner. It also agreed that the indenture was governed by the laws of New York and that it would submit "to the jurisdiction of any court of the State of New York or any United States federal court sitting in the Borough of Manhattan, New York City, New York." Pet. App. 2a-3a, 15a-18a; see Pet. 3.

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[1] The United Kingdom Overseas Territories include Anguilla, Bermuda, British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, the Pitcairn Islands, Saint Helena and dependencies, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands. Pet. 6 n.2; British Nationality Act 1981, 31 *Halsbury's Statutes of England and Wales* 127, Sched. 6 (4th ed. 1994). Prior to 1998, the United Kingdom referred to the Overseas Territories as "Dependent Territories," but there is "no practical difference" between those terms. Pet. App. 6a n.1. Until its July 1, 1997, reversion to China, Hong Kong was a British Dependent Territory.

When respondent defaulted on its payments, petitioner brought this action in federal district court to obtain immediate repayment of respondent's indebtedness, including both principal and interest. The district court granted petitioner's motion for summary judgment in its entirety. Pet. App. 15a-54a. That court determined at the outset, and without objection from respondent, that it possessed subject matter jurisdiction by virtue of the alienage diversity statute, 28 U.S.C. 1332(a)(2), "because [petitioner] is a corporate citizen of New York, [respondent] is a corporate citizen of the British Virgin Islands and the matter in controversy exceeds $75,000." Pet. App. 17a. The court then rejected respondent's "impossibility" defense to liability, *id.* at 36a-52a, and authorized petitioner to foreclose on collateral accounts totaling $49,054,290.84, *id.* at 8a-9a, 54a. The court later issued an order directing entry of a deficiency judgment in the amount of $98,388,352.74. *Id.* 8a-14a.

2. On respondent's appeal, the court of appeals sua sponte raised the question whether the district court possessed subject matter jurisdiction under the alienage diversity statute. Following supplemental briefing, the court of appeals ruled that the district court lacked jurisdiction because corporations organized under the laws of United Kingdom Overseas Territories do not qualify as "citizens or subjects of a foreign state" under 28 U.S.C. 1332(a)(2). Pet. App. 1a-7a. The court observed that it had addressed the application of the alienage diversity statute to United Kingdom Overseas Territories (which were then called Dependent Territories, see note 1, *supra*) in *Matimak Trading Co.*, *supra*.

In *Matimak*, a corporation incorporated in Hong Kong, which was then a Dependent Territory, invoked a federal district court's alienage diversity jurisdiction prior to Hong Kong's 1997 reversion to China. The court of appeals ruled that, because "the United States does not regard Hong Kong

as an independent, sovereign political entity," the corporation did not qualify as a "citizen[] or subject[] of a foreign state." Pet. App. 5a (quoting *Matimak*, 118 F.3d at 82). Furthermore, the court ruled that, because the corporation was not a citizen or subject of the United Kingdom under British law, the corporation was "stateless" and "c[ould not] sue a United States citizen under alienage jurisdiction." *Ibid.* (quoting *Matimak*, 118 F.3d at 85, 86). The court of appeals subsequently adhered to the *Matimak* reasoning in *Koehler* v. *Bank of Bermuda (New York) Ltd.*, 209 F.3d 130, amended, 229 F.3d 424, rehearing en banc denied, 229 F.3d 187 (2d Cir. 2000) (Bermuda corporation and citizen), and *Universal Reinsurance Co.* v. *St. Paul Fire & Marine Insurance Co.*, 224 F.3d 139 (2d Cir. 2000) (Bermuda corporation).

In this case, the court noted, respondent is a corporation created under the laws of the British Virgin Islands, and "[t]he British Virgin Islands is a British Dependent Territory, as Hong Kong was at the time of *Matimak* and Bermuda was at the time of *Koehler* and *Universal Reinsurance*." Pet. App. 6a. Finding that "[n]othing relevant to the alienage jurisdiction inquiry has changed since we decided those appeals," the court of appeals concluded that "[w]e are bound to hold that [respondent] is not a citizen or subject of a foreign state and that the district court therefore had no alienage jurisdiction over this action under § 1332(a)(2)." *Id.* at 6a-7a. Finding no other basis for jurisdiction, the court of appeals reversed the judgment of the district court and remanded the case to that court with instructions to dismiss the complaint. *Id.* at 7a. The court of appeals later denied a petition for rehearing en banc. *Id.* at 55a-56a.

SUMMARY OF ARGUMENT

Corporations chartered in United Kingdom Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of alienage jurisdiction under 28 U.S.C. 1332(a)(2). The term "citizens or subjects" includes all persons or entities that are subject to the sovereign authority of a recognized state. Respondent falls within this definition because it was created pursuant to the laws of the United Kingdom and is subject to that nation's sovereignty. The origins and purposes of Article III's alienage diversity clause, and of the statutes Congress has enacted to give it effect, confirm that reading. Indeed, by preventing disputes like this one from being heard in a neutral federal forum, the Second Circuit's *Matimak* decision has frustrated each of the twin purposes of alienage jurisdiction—avoiding conflicts with foreign governments and facilitating international commerce.

Respondent is a "citizen or subject" of the United Kingdom within the plain meaning of that term. The standard definition of "subject" is one who owes allegiance to a sovereign and is governed by its laws. For more than a century, this Court has recognized that corporations are to be treated as citizens or subjects of the sovereign under whose laws they were created. The United Kingdom has clearly asserted sovereignty over the British Virgin Islands and the other United Kingdom Overseas Territories, and the United States has consistently recognized the United Kingdom's authority over them.

The meaning of the alienage diversity statute is further illuminated by the origins and history of alienage jurisdiction. The Framers of the Constitution unanimously agreed that a neutral federal forum was needed to resolve disputes involving foreign citizens and subjects—both to avoid controversies with foreign powers and to attract

much-needed foreign investment. The term "subject" had the same broad meaning at the time of the framing that it has now. Congress has consistently provided for alienage jurisdiction since the Judiciary Act of 1789, and, though the precise terminology has varied, there is no evidence that it has ever intended to define "citizen or subject" in a manner narrower than that authorized by the Constitution.

The Second Circuit is alone among the courts of appeals in refusing to recognize alienage diversity jurisdiction over corporations chartered in United Kingdom Overseas Territories. That court's error arose from its mistaken belief that the question whether such corporations are "citizens or subjects" of the United Kingdom within the meaning of Article III and 28 U.S.C. 1332(a)(2) is one of United Kingdom law instead of United States law. Foreign states may certainly define "citizen" and "subject" for purposes of their own immigration, nationality, and commercial laws, but whether an individual or entity is a "citizen or subject" of a particular state for purposes of federal alienage jurisdiction is ultimately a question of federal, not foreign, law. Because both the plain meaning and purposes of 28 U.S.C. 1332(a)(2) support the same result, corporations chartered in United Kingdom Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of alienage jurisdiction.

ARGUMENT

THE ALIENAGE DIVERSITY STATUTE GRANTS FEDERAL DISTRICT COURTS JURISDICTION OVER SUITS BETWEEN CITIZENS OF A STATE AND CORPORATIONS ORGANIZED UNDER THE LAWS OF A UNITED KINGDOM OVERSEAS TERRITORY

A. The Plain Language Of The Alienage Diversity Statute Establishes That Corporations Organized Under The Laws Of United Kingdom Overseas Territories Are "Citizens Or Subjects Of A Foreign State"

The alienage diversity statute grants federal district courts jurisdiction over disputes between "citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. 1332(a)(2). The controlling issue here is whether corporations organized under the laws of United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of that statute. Those corporations are included within that term because they are subject to the sovereignty of the United Kingdom and governed by its laws.

The term "citizen or subject" includes all persons or entities that are subject to the sovereign authority of a foreign state. As this Court observed in *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898):

> Subject and citizen are, in a degree, convertible terms as applied to natives; and though the term *citizen* seems to be appropriate to republican freemen, yet we are equally with the inhabitants of all other countries, *subjects*, for we are equally bound by allegiance and subjection to the government and law of the land.

Id. at 665 (quoting 2 James Kent, *Commentaries on American Law* 258 n.b. (6th ed. 1848)). See generally *id.* at 658-666. The term "citizen or subject" accordingly embraces

all that is encompassed by the plain meaning of the term "subject" and includes any person or entity that "owes allegiance to a sovereign and is governed by that sovereign's laws." *Black's Law Dictionary* 1438 (7th ed. 1999).[2]

The term "citizens or subjects" is not limited to natural persons. Under long established principles of jurisdiction, "citizens or subjects of a foreign state" include corporations and other organizations that are created under the laws of a foreign state. See, *e.g.*, *Steamship Co.* v. *Tugman*, 106 U.S. 118, 121 (1882) (Harlan, J.) ("a corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such State"). See also *Swiss National Insurance Co.* v. *Miller*, 267 U.S. 42, 46 (1925); Joseph Story, *Commentaries on the Constitution of the United States* § 891, at 636 (Ronald D. Rotunda & John E. Nowak eds., 1987).[3]

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[2] Accord *Webster's Third New International Dictionary* 2275 (1976) (defining a "subject" as "one that is placed under the authority, dominion, control, or influence of someone or something: as * * * (1): one subject to a monarch or ruler and governed by his law (2): one who lives in the territory of, enjoys the protection of, and owes allegiance to a sovereign power or state"); *American Heritage Dictionary of the English Language* 1788 (3d ed. 1992) (defining a "subject" as "[o]ne who is under the rule of another or others, especially one who owes allegiance to a government or ruler"); 17 *Oxford English Dictionary* 28 (2d ed. 1989) (defining a "subject" as "[o]ne who is under the dominion of a monarch or reigning prince; one who owes allegiance to a government or ruling power, is subject to its laws, and enjoys its protection").

[3] Congress has stated expressly that, for purposes of ordinary diversity jurisdiction, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. 1332(c)(1). The term "State" in that provision refers to the "States" comprising the United States (as well as United States Territories, the District of Columbia, and the Commonwealth of Puerto Rico). See 28 U.S.C. 1332(d).

The corporation in this case was organized under the laws of the British Virgin Islands, a United Kingdom Overseas Territory. As the United States has recognized, the United Kingdom clearly has sovereign authority over that Territory.[4] The United States conducts official diplomatic relations with the British Virgin Islands through the United Kingdom's Foreign and Commonwealth Office.[5] The United Kingdom has expressed its retention of sovereignty through the Constitution of the British Virgin Islands, which, among other things, explicitly reserves the United Kingdom's "full power to make laws for the peace, order and good government of the Virgin Islands." British Virgin Islands (Constitution) Order 1976, § 71.[6]

[4] See generally 6 *Halsbury's Laws of England* para. 983 (4th ed. 1991) ("Her Majesty's government in the United Kingdom is internationally responsible for the external affairs of United Kingdom dependent territories," and can, *inter alia*, "create international obligations and liabilities * * * in respect of the dependent territories," and bind them by its "declaration of war or peace"); *id.* para. 988 ("[t]he competence of the Parliament of the United Kingdom to legislate for the overseas dependencies of the Crown has not been in serious doubt since the seventeenth century").

[5] The United States' international agreement with the British Virgin Islands is identified in the State Department's authoritative *Treaties In Force* under the heading of the "United Kingdom." See United States Dep't of State, *Treaties In Force* 302, 312 (2000) (*http://www.state.gov/s/l/c3431.htm*). The United Kingdom and the United States have also agreed to a Consular Convention, 3 U.S.T. 3426, T.I.A.S. No. 2494 (1952), which is "[a]pplicable to all territories over which the United States has jurisdiction * * * and *to all British Territories*." *Treaties In Force*, *supra*, at 304 (emphasis added). The Convention defines those "nationals" of each country who may avail themselves of the consular arrangements under that agreement. "[I]n relation to His Majesty," the Convention defines "nationals" to include "all citizens of the United Kingdom and colonies * * *, including, where the context permits, all juridical entities duly created under the law of any of those territories." Consular Convention, Art. 2, sec. (4), 3 U.S.T. at 3428.

The British Virgin Islands Constitution was issued by Queen Elizabeth as an Order in Council, acting pursuant to her sovereign prerogative and statutory authority from Parliament under the West Indies Act. 6 *Halsbury's Laws of England*, *supra*, para. 1079, citing, *inter alia*, West Indies Act 1962, § 5. Full executive authority over the British Virgin Islands is vested in the Queen, Constitution § 13, who appoints a Governor to serve at her pleasure and to exercise powers in her behalf, *id.* §§ 3-6. The legislature, which consists of the Queen and a popularly elected Legislative Council, has authority to "make laws for the peace, order and good government of the Virgin Islands," and a bill becomes law only when assented to by the Queen or by the Governor "on her Majesty's behalf." *Id.* §§ 25, 34, 42. The Queen may also disallow a law to which the Governor has already assented. *Id.* § 43.

Corporations organized within the British Virgin Islands, like the citizens thereof, are therefore subject, ultimately, to the United Kingdom's sovereignty. Hence, the plain language of the alienage diversity statute, coupled with unambiguous provisions of British law, is sufficient by itself to establish that a federal district court may entertain this suit between a New York corporation and a corporation organized under the laws of the British Virgin Islands.

B. The Origins And History Of Alienage Diversity Jurisdiction Confirm The Plain Meaning Of The Statute

The plain terms of the alienage diversity statute take on additional significance when read in historical context. The

[6] The British Virgin Islands Constitution is reprinted in 2 *Constitutions of Dependencies And Special Sovereignties* (Blaustein ed., 1982), and at the following web-site: *http://www.bvi.gov.vg/template.php?main=vg&section=national_focus&sub=constitution*.

concept of alienage diversity jurisdiction originated at the Constitutional Convention. The Framers made provision for that jurisdiction to avoid controversies with foreign governments and to encourage foreign commerce and investment. Congress implemented the Framers' design through legislation that, while evolving over the years, has always granted federal courts jurisdiction to hear suits between citizens of a State and corporations subject to the authority of a foreign state, such as the British Virgin Islands corporation involved in this case.

1. The Framers Authorized Federal Jurisdiction Over Controversies Between Citizens Of A State And Corporations Subject To The Sovereign Authority Of A Foreign State

The Constitution provides that the "judicial Power" of the United States shall extend to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. Art. III, § 2, Cl. 1. The Framers included that Clause expressly to enable Congress to provide a neutral federal forum for lawsuits involving foreign citizens and subjects, in addition to the judicial fora provided by the individual States. Experience under the Articles of Confederation revealed the need for a neutral national forum for foreigners in litigation with United States citizens. See generally Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations And Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 6-10 (1996).[7]

Following the Revolutionary War, various state courts and legislatures, responding to anti-British sentiment, made

[7] See also 15 James Wm. Moore, et al., *Moore's Federal Practice* § 102.73 (3d ed. 1999); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1927-1928).

it difficult for British creditors to collect private debts from American debtors, notwithstanding the United States' agreement in the Treaty of Paris that no impediments would be imposed to the collection of "the full value * * * of all bona fide debts heretofore contracted." Definitive Treaty of Peace, Sept. 3, 1783, United States-Great Britain, Art. 4, 8 Stat. 82. See Johnson, *supra*, 21 Yale J. Int'l L. at 6-10. The States' conduct threatened to antagonize a major foreign power and to discourage much-needed foreign investment. See *ibid.* Consequently, the various plans the Framers considered for the Constitution all proposed to address that problem by providing a national forum for suits between citizens of a State and "foreigners." *Id.* at 10.[8]

The Framers enunciated two specific reasons why the Constitution should provide for alienage jurisdiction: to avoid controversies with foreign governments and to encourage foreign commerce and investment. Alexander Hamilton provided the classic statement of the former reason:

> [T]he peace of the WHOLE ought not to be left at the disposal of a PART. The union will undoubtedly be

[8] See 1 *The Records of the Federal Convention of 1787* at 22 (Max Farrand ed., 1911) (Farrand) (Randolph's Virginia Plan) ("jurisdiction * * * to hear & determine * * * cases in which foreigners * * * may be interested"); *id.* at 244 (Patterson's New Jersey Plan) ("authority to hear & determine * * * in all cases in which foreigners may be interested"); *id.* at 292 (Hamilton's Plan) ("jurisdiction * * * in all causes in which * * * the citizens of foreign nations are concerned"); 2 Farrand 432 (Mason's Plan) ("jurisdiction * * * shall extend to * * * controversies * * * between a State and the citizens thereof and foreign States, citizens or subjects") (emphasis omitted); 3 Farrand 608 (Pickney's Plan) ("Questions * * * on the Construction of Treaties made by U.S—or on the Law of Nations.") (emphasis omitted); see also *id.* at 169-170 (diary of Ezra Stiles) (Framers "were unanimous [convinced] in the Expedy & Necessy of a supreme judiciary Tribunal of universal Jurisdiction—in Controversies of a legal Nature between States—Revenue—& appellate Causes between subjects of foreign or different States.").

> answerable to foreign powers for the conduct of its members [*i.e.*, the States]. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.

The Federalist No. 80, at 403-404 (Alexander Hamilton) (Wills ed. 1982).[9] James Wilson articulated the latter reason:

> [I]s it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? * * * It was thought proper to give the citizens of foreign states full opportunity of obtaining justice in the general courts, and this they have by its appellate jurisdiction; therefore, in order to restore credit with

[9] See also Joseph Story, *Commentaries on the Constitution* § 888, at 633-634 (Ronald D. Rotunda & John E. Nowak eds., 1987) (quoting Hamilton). Hamilton pointed out that an injustice against a "foreigner," if unredressed, could be regarded as "an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general laws of nations." *The Federalist No. 80*, at 404. Indeed, "[s]o great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals." *Ibid.* Others expressed similar views. See, *e.g.*, 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 583 (Jonathan Elliot ed., 1987) (Elliot) (comments of James Madison); 2 Elliot 491-493 (James Wilson); 4 Elliot 158-159 (William Davie); Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *reprinted in* 14 *The Documentary History of the Ratification of the Constitution* 193, 204 (1983).

> those foreign states, that part of the article is necessary. I believe the alteration that will take place in their minds when they learn the operation of this clause, will be a great and important advantage to our country; nor is it any thing but justice: they ought to have the same security against the state laws that may be made, that the citizens have; because regulations ought to be equally just in the one case as in the other.

2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 491-492 (Jonathan Elliot ed., 1987).[10]

The district court's exercise of jurisdiction in this case falls comfortably within both the text and original purpose of the Constitution's alienage diversity clause. Then, as now, the term "subject" included all persons who were subject to the sovereign authority of a foreign state.[11] Indeed, this Court has articulated that proposition specifically with re-

[10] See 3 Elliot 583 (James Madison) ("We well know, sir, that foreigners cannot get justice done them in [the state] courts, and this has prevented many wealthy gentlemen from trading or residing among us."). See also Story, *supra*, § 889, at 634-635.

[11] See Samuel Johnson, *A Dictionary Of The English Language* (1755; facsimile ed. Georg Olms Verlagsbuchhandlung 1968) (defining "subject" as "[o]ne who lives under the dominion of another"); Noah Webster, *American Dictionary of the English Language* (1828; facsimile ed. Foundation for Christian Education 1985) ("subject" is "[o]ne that owes allegiance to a sovereign and is governed by his laws"). See also 2 James Kent, *Commentaries on American Law* 258 n.b (6th ed. 1848) ("subjects" are "bound by allegiance and subjection to the government and law of the land"); *Inglis* v. *Trustees of the Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting) ("The rule commonly laid down in the books is, that every person who is born within the ligeance of a sovereign is a subject * * *. Now, allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign.").

spect to what persons were subjects of Great Britain at the time the Constitution was adopted. See *Wong Kim Ark*, 169 U.S. at 658-666.[12] Moreover, as this Court concluded more than a century ago, foreign corporations come within this definition because they are necessarily created under the laws, and subject to the authority, of some foreign state. See *Steamship Co.*, 106 U.S. at 121.[13] A federal court's exercise of jurisdiction over cases like this one is also consistent with the original purposes of the alienage diversity clause because, as explained below (at pp. 23-25 *infra*), the Second Circuit's *Matimak* decision has caused substantial tension with the United Kingdom and could discourage significant amounts of international trade. An historical reading of the underlying constitutional provision thus confirms the plain meaning of the alienage diversity statute.

2. The Alienage Diversity Statute, Throughout Its History, Has Conferred Jurisdiction Over Suits Between Citizens Of A State And Corporations Subject To The Sovereign Authority Of A Foreign State

Congress has effectuated Article III's establishment of alienage diversity jurisdiction through a series of enactments, including: (a) the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78; (b) the Act of March 3, 1875, ch. 137, 18 Stat. (Pt. 3)

[12] For example, the Court cited approvingly, the following passage from *State* v. *Manuel*, 4 Dev. & Bat. 20, 24 (N.C. 1838): "Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens." *Wong Kim Ark*, 169 U.S. at 663.

[13] See also Story, *supra*, § 891, at 635-636 ("The inquiry may here be made, who are to be deemed aliens entitled to sue in the courts of the United States. The general answer is, any person, who is not a citizen of the United States. * * * A foreign corporation, established in a foreign country, all of whose members are aliens, is entitled to sue in the same manner, that an alien may personally sue in the courts of the Union.").

470; and (c) the 1948 recodification of the Judicial Code, ch. 646, § 1332(a)(2), 62 Stat. 930, as amended by the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891. In each instance, Congress has granted federal courts alienage diversity jurisdiction through language synonymous with Article III's alienage diversity clause. That language, which implements the Framers' objectives of avoiding disputes with foreign governments and facilitating international commerce, is sufficiently broad to embrace suits involving foreign corporations such as the British Virgin Islands corporation involved here.

a. The Judiciary Act of 1789, under which the federal courts were first organized, provided that the federal courts "shall have original cognizance * * * of all suits of a civil nature * * * where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * * an alien is a party." § 11, 1 Stat. 78. There is no evidence that the First Congress used the term "alien" to connote a measure of jurisdiction other than that authorized by the Article III's alienage diversity clause. That Congress, like the Framers and this Court during that period, used the term "alien" synonymously with the terms "foreigner" and "Citizens or Subjects" of a foreign state.[14] The legislative history of the Judiciary Act indicates that the First Congress, like the Framers, intended to refer to *any* person who is subject to the authority of a foreign state.[15]

[14] See *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87-88 (1809) (Marshall, C.J.) (recognizing that Article III "established national tribunals for the decision of controversies between aliens and a citizen"), overruled in part on other grounds, *Louisville, Cincinnati & Charleston R.R.* v. *Letson*, 43 U.S. (2 How.) 497 (1844); see also *Mossman* v. *Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800).

[15] Oliver Ellsworth, the principal architect of the Judiciary Act, described the jurisdictional proposal as encompassing "controversies between foreigners and citizens" in a letter discussing the "outlines of a

The Congress that enacted the Judiciary Act of 1789 included many of those who had taken part in framing the Constitution, and it was no less aware than the Framers of the foreign relations and commercial concerns that had motivated the creation of alienage diversity jurisdiction. That Congress drafted the Judiciary Act to implement the solution that the Framers had envisioned—a federal forum for suits between citizens of a State and those who are "citizens" or "subjects" of a foreign state. Cf. *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983); *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

b. The Act of March 3, 1875, replaced the Judiciary Act's language granting jurisdiction over suits in which "an alien is a party" with language stating that federal courts shall have jurisdiction over suits "between citizens of a State and foreign states, citizens, or subjects." 18 Stat. (Pt. 3) 470. The legislative history of the 1875 Act does not indicate a reason for the change. See 2 Cong. Rec. 4978-4988 (1874); 3 Cong. Rec. 1992, 2168, 2240, 2275 (1875). It was most likely made, however, to eliminate any basis for claiming that federal court jurisdiction could be invoked simply by alleging that one of the parties was an alien without regard to the citizenship of the opposing party. See Johnson, *supra*, 21 Yale J. Int'l L. at 21; see also *Jackson* v. *Twentyman*, 27 U.S. (2 Pet.) 136 (1829) (noting that the Judiciary Act "must be construed in connexion with and in conformity to the con-

judiciary system" then before his Senate Committee. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 60 (1923). That language was repeated in the draft bill. *Id.* at 77-79. The term "foreigner" was changed to "alien" sometime before final enactment, possibly by the Senate. Cf. *id.* at 90-91 (similar change to the provision governing removal of suits by "aliens" from state court). The legislative debates generally referred to "foreigners" or "aliens." See 1 Annals of Congress 810, 814, 825 (Joseph Gales ed., 1834) (House debates); see also Friendly, *supra*, 41 Harv. L. Rev. at 501-502.

stitution" and therefore did not extend jurisdiction "to private suits, in which an alien is a party, unless a citizen be the adverse party"); accord *Hodgson* v. *Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); *Mossman* v. *Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800). The effect of that amendment was to place in force an alienage diversity statute that tracked, even more closely, the language of Article III's alienage diversity clause. The similarity in language indicates that Congress fully intended that the statute would be applied consistently with the objectives of the clause—to avoid controversies with foreign governments and to facilitate commerce. Had Congress intended to contract the scope of alienage diversity jurisdiction, it presumably would have said so.

c. Congress recodified the Judicial Code in 1948, granting district courts jurisdiction over suits between, *inter alia*, "Citizens of a State, and foreign states or citizens or subjects thereof." 62 Stat. 930, codified at 28 U.S.C. 1332(a)(2)). That formulation did not differ in substance from the 1875 Act. Congress further amended that provision, through the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891. That amendment removed Section 1332(a)(2)'s reference to suits in which "foreign states" themselves are a party.[16] As a consequence, the alienage diversity statute now grants federal district courts jurisdiction over suits between "citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. 1332(a)(2). That formulation, like the Judiciary Act of 1789 and the Act of March 3, 1875, imparts the full measure of Article III's alienage diversity jurisdiction.

[16] Suits between citizens of a State and a foreign state are now separately authorized in 28 U.S.C. 1332(a)(4) (foreign state as plaintiff) and 28 U.S.C. 1602 *et seq.* (limited conditions under which foreign sovereign may be sued as defendant).

The foregoing history demonstrates that, while the precise language of the alienage diversity statute has evolved over the past two centuries, its meaning and objectives have remained constant. The alienage diversity statute has consistently granted federal courts jurisdiction over suits between a citizen of a State and a corporation, like respondent, that is subject to the authority of a foreign state. That grant fulfills the Framers' express objective of providing a neutral national forum for such disputes, in order to avoid controversies with foreign governments and to encourage international commerce.

C. The Court Of Appeals' Rationale For Refusing To Recognize Alienage Diversity Jurisdiction Over Corporations Of United Kingdom Overseas Territories Is Flawed

The Second Circuit, alone among the courts of appeals that have considered the issue, has refused to treat citizens and corporations of United Kingdom Overseas Territories as "citizens or subjects" of the United Kingdom for purposes of the alienage diversity statute.[17] That court has not contested the United Kingdom's ultimate sovereignty over its Overseas Territories or the United States' recognition of that sovereignty. Rather, the court scrutinized British laws governing citizenship and nationality, which were enacted to effectuate that country's domestic residency and immigration policies, and attempted to determine whether corporations chartered in United Kingdom Overseas Territories are "citizens or subjects" within the meaning of the laws of the

[17] Compare Pet. App. 1a-7a with *Southern Cross Overseas Agencies, Inc.* v. *Wah Kwong Shipping Group Ltd.*, 181 F.3d 410 412-413 (3d Cir. 1999) (pre-reversion Hong Kong corporation); *Koehler* v. *Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998) (Bermuda resident); *Wilson* v. *Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-1243 (7th Cir. 1990), cert. denied, 499 U.S. 947 (1991) (Cayman Island corporation).

United Kingdom. The court of appeals' construction of foreign law led it to the anomalous conclusion that such corporations, which owe their existence to United Kingdom law, are nevertheless "stateless." *Matimak*, 118 F.3d at 82-86; see also *Koehler* v. *Bank of Bermuda (New York) Ltd.*, 209 F.3d 130, amended, 229 F.3d 424, rehearing en banc denied, 229 F.3d 187 (2d Cir. 2000); *Universal Reinsurance Co.* v. *St. Paul Fire & Marine Ins. Co.*, 224 F.3d 139 (2d Cir. 2000).

The court of appeals overlooked that the question whether corporations chartered in United Kingdom Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of Article III and the alienage diversity statute is a question of federal law, rather than United Kingdom law. The United Kingdom strongly disputes the court of appeals' construction of its laws. See, *e.g.*, British Embassy, Washington, D.C., Diplomatic Note No. 13/2000 (Feb. 2, 2000).[18] But even assuming, arguendo, that the court of appeals correctly interpreted those laws, the meaning that a foreign country may give, under certain of its own laws and for its own purposes, to the terms "citizen" or "subject" does not control whether an individual or entity falls within the meaning of those terms for the purposes that the Framers and Congress intended. As Judge Sotomayer observed:

> None would argue with the notion that a foreign state is entitled to define what persons or entities fall into its categories of "citizen" or "subject," or any other of a variety of legal forms that exist under its own domestic immigration, nationality, and commercial law. The domestic meaning that any particular country may give to the terms "citizen" or "subject" does not, however, bind our courts in determining whether an individual or entity

[18] The United Kingdom has informed us that it intends to file a brief amicus curiae, setting forth its views on the question presented in this case.

> falls within the statutory meaning of such terms as provided by our law of alienage jurisdiction. The wide disparity in meaning that exists among countries concerning such terms requires that our alienage jurisdiction be determined not according to the appearance of the words "citizen" or "subject" (or translation thereof) in the pages of a country's domestic code, but according to whether United States law deems such persons or entities to be "citizens or subjects" under our Constitution and statutes for the purpose of alienage jurisdiction.

Koehler, 229 F.3d at 190 (Sotomayer, J., dissenting).[19] Cf. 15 James Wm. Moore, et al., *Moore's Federal Practice* § 102.34[3][a] (3d ed. 2001) ("Determination of a litigant's state of domicile for purposes of diversity is controlled by federal common law, not by the law of any state.").

As previously explained (pp. 8-9, *supra*), the term "citizens or subjects of a foreign state" has a specific meaning for purposes of alienage diversity jurisdiction. By virtue of its plain terms, the phrase includes any individual or corporation that is subject to the sovereign authority of a foreign state. The determination whether an individual or corporation qualifies, in most cases, is simple. The courts need simply to determine whether the United States recognizes the sovereignty of the foreign state to which the individual owes allegiance or to which the corporation ultimately owes its existence. In cases in which the status of the person or individual is in doubt, the court should give deference to the views of the United States respecting the status of the person or entity. See *Southern Cross Overseas Agencies, Inc.* v. *Wah Kwong Shipping Group, Ltd.*, 181 F.3d 410, 418 (3d Cir. 1999) (giving deference to the Executive Branch's judgment).

[19] Judge Sotomayer's reasoning is confirmed by *Steamship Co.* v. *Tugman*, 106 U.S. 118 (1882). That case involved a corporation that, in support of a petition to remove a suit from state court to federal court, alleged that it had been "created by, and exist[ed] under, the laws of the United Kingdom of Great Britain and Ireland." *Id.* at 121. This Court did not scrutinize United Kingdom law to determine whether that country regarded such corporations as its "citizens or subjects." Instead, the Court held that—"for purposes of jurisdiction in the courts of the United States"—"a corporation of a foreign State is * * * to be deemed, constructively, a citizen or subject of such State." *Ibid.*

The court of appeals' contrary approach not only subverts the plain meaning of the alienage diversity statute, but also undermines its basic purpose of avoiding controversy with foreign governments. As Judge Sotomayor observed, "there can be no doubt that the fundamental purpose of alienage jurisdiction—to [a]void offense to foreign nations—is frustrated by the *Matimak* decision." 229 F.3d at 188. The United Kingdom, "the very country the drafters of the alienage jurisdiction provision had in mind more than two hundred years ago when they sought to open the federal courts to foreign litigants," *id.* at 189, has repeatedly expressed its strong disapproval of that decision to the United States government and to the United States courts, *id.* at 188 n.3.

The court of appeals' erroneous ruling also threatens to undercut substantially another purpose of alienage diversity jurisdiction—to encourage international trade with the United States by assuring foreign businesses access to a neutral federal forum for the resolution of disputes with American concerns. In addition to the United Kingdom, a number of other nations have dependent territories or possessions.[20] Some of those territories and possessions

[20] Those nations include France (Bassas da India, Clipperton Island, Europa Island, French Polynesia, French Southern and Antarctic Islands, Glorioso Islands, Juan de Nova Island, New Caledonia, Tromelin Island, and Wallis and Futuna), the Netherlands (Aruba and the Netherlands Antilles), Australia (Ashmore and Cartier Islands, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Heard Island and McDonald

—including Anguilla, Aruba, Bermuda, the British Virgin Islands, the Cayman Islands, the Netherlands Antilles, and the Turks and Caicos Islands—are important commercial centers for global banking, insurance and other businesses that regularly transact substantial volumes of business with citizens of the United States. See Secretary of State for Foreign and Commonwealth Affairs et al., *Review of Financial Regulation in the Caribbean Overseas Territories and Bermuda* (Oct. 2000) (*Review of Financial Regulation*) <*http://www.archive.official-documents.co.uk/document/cm48/4855/4855.htm*>.

For example, the British Virgin Islands are home to more than 1500 mutual funds, as well as several hundred thousand other corporations. See *Review of Financial Regulation—The British Virgin Islands*, *supra*, at 1.2. The United States conducts extensive trade with the British Virgin Islands, which in the year 2000 totaled $64.6 million in exports and $30.9 million in imports, for a positive trade balance of $33.7 million. United States Census Bureau, *Statistical Abstract of the United States* 802 (2001).

Bermuda is a major international center for insurance. Bermuda insurance companies collect gross annual premiums of more than $20 billion annually and maintain total assets of more than $100 billion. See *Review of Financial Regulation—Bermuda*, *supra*, at 1.2. In the year 2000, the United States had $428.1 million in exports to Bermuda, and $39 million in imports, for a positive trade balance of $389.1 million. *Statistical Abstract of the United States*, *supra*, at 802.

Islands, Norfolk Island), New Zealand (Cook Islands, Niue, and Tokelau), Denmark (Faroe Islands, Greenland), and Norway (Bouvet Island, Jan Mayen, Svalbard). See *http://www.state.gov/www/regions/dependencies.html*; see also *CIA World Factbook 2001*, *http://www.cia.gov/cia/publications/factbook/*.

The Cayman Islands are home to banks, insurance companies, and mutual funds. More than 450 banks from 65 countries hold assets that total in excess of $650 billion in Cayman Islands branches. See *Review of Financial Regulation—Cayman Islands*, *supra*, at 1.2. In the year 2000, the United States had $354 million in exports to the Cayman Islands, and $6.5 in imports, for a positive trade balance of $347.5 million. *Statistical Abstract of the United States*, *supra*, at 802.

These figures and statistics demonstrate that the British Overseas Territories support a substantial volume of international trade with the United States. There is no sound reason why the alienage diversity statute should not be available to provide federal jurisdiction for the important disputes that inevitably arise in the course of extensive commercial dealings. To the contrary, it is critical that the federal forum that Congress intended be available for the benefit of commercial interests in both the United States and the United Kingdom.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISION INVOLVED

1. Section 1332 of Title 28 of the United States Code provides:

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district

court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

THE CHASE MANHATTAN BANK, AS INDENTURE TRUSTEE, UNDER THE INDENTURE, DATED AS OF MAY 6, 1998,
Petitioner,
v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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40 pp

QUESTION PRESENTED

Whether corporations organized under the laws of the British Virgin Islands and other United Kingdom Overseas Territories qualify as "citizens or subjects of a foreign state" under the federal alienage diversity jurisdiction statute, 28 U.S.C. § 1332(a)(2).

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IN THE

Supreme Court of the United States

OCTOBER TERM 2001

No. 01-651

THE CHASE MANHATTAN BANK, AS INDENTURE TRUSTEE, UNDER THE INDENTURE, DATED AS OF MAY 6, 1998,
Petitioner,
v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Government of the United Kingdom of Great Britain and Northern Ireland submits this *amicus curiae* brief in support of petitioner, The Chase Manhattan Bank (now known as JPMorgan Chase Bank).[1]

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the United Kingdom or its counsel has made a monetary contribution to the brief's preparation and submission.

INTEREST OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The United Kingdom has a substantial interest in the question before the Court – whether corporations formed under the laws of the United Kingdom Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of the alienage diversity jurisdiction statute. The issue directly implicates how the United Kingdom, under its own laws, views the nationality of such corporations.[2] The decision below has perpetuated a misinterpretation of United Kingdom law by the same court in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998). If permitted to stand, the decision will result in hundreds of thousands of Overseas Territories corporations – all of which the United Kingdom considers its subjects – being denied access to the jurisdiction of United States federal courts. Placing those corporations beyond the reach of federal jurisdiction jeopardizes the

[2] The "United Kingdom," in the community of sovereign states, includes the metropolitan territory of Great Britain and Northern Ireland (consisting of England, Wales, Scotland, and Northern Ireland), the Overseas Territories, and the Crown Dependencies. The Overseas Territories consist of Anguilla, Bermuda, the British Antarctic Territory, the British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the Sovereign Base Areas in Cyprus, the Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena and dependencies, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands. The Crown Dependencies consist of the Channel Islands (the Bailiwicks of Jersey and Guernsey) and the Isle of Man.

stability of commercial dealings between those corporations and their American trading partners, and threatens the viability of future investment and commerce. This, in turn, could cause broader damage to the commercial relations between the United States and the United Kingdom in various places throughout the world.

Her Majesty's Government expressed its concern about this issue in a recent Diplomatic Note requesting assistance from the United States Department of State in obtaining a reversal of the decision below. That Diplomatic Note sets forth the United Kingdom's position in unmistakable terms:

> The United Kingdom wishes to restate its position that corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom. The United Kingdom is therefore of the view that such corporations ought to be amenable to the alienage jurisdiction of United States Federal Courts under 28 U.S.C. § 1332(a)(2), whether as plaintiffs or defendants. Court decisions which fail to recognise such jurisdiction may have a serious detrimental effect on the trading relationship between the United States and the United Kingdom Overseas Territories.

Diplomatic Note No. 90/2001 (Oct. 5, 2001) (printed in the appendix to the brief submitted by the United Kingdom in support of the petition for a writ of *certiorari* in this case).

The United Kingdom Government also has submitted its views to several courts in the United States in which the issue of the nationality of Overseas Territories corporations has arisen. For example, in February 2000 the United Kingdom filed an *amicus curiae* brief in the Second Circuit in support of the appellee in *III Finance*

Ltd. v. Aegis Consumer Finance, Inc. No. 00-7016 (2d Cir. 2000). In that brief, the United Kingdom attached an earlier Diplomatic Note to the United States setting forth its official position that "corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom." L-29 (Diplomatic Note No. 13/2000 (Feb. 2, 2000)).[3] That same year, the United Kingdom filed another *amicus curiae* brief on this issue in the Fifth Circuit in *ART 57 Properties, Inc. v. 57 BB Property, L.L.C.*, No. 99-10385 (5th Cir. 2000). L-1. The appellate courts in *III Finance* and *ART 57 Properties* did not reach the merits of the alienage jurisdiction issue.

In addition, the United Kingdom filed an *amicus curiae* brief in support of the petition for a writ of *certiorari* filed in *Matimak Trading Co. v. Khalily*, No. 97-893 (Dec. 29, 1997). The Attorney General of the British Virgin Islands issued a statement dated February 3, 2000, expressing his support of the position taken by the United Kingdom before the United States courts. L-35.

SUMMARY OF ARGUMENT

In holding that a British Virgin Islands corporation is not a "citizen or subject of a foreign state" under the alienage diversity jurisdiction statute, the court below relied entirely on its earlier erroneous ruling in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998), and other Second Circuit cases following that decision. Every other court of appeals to consider the question has reached the opposite

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[3] "L-__" refers to the Lodging that the parties are submitting to the court together with their Joint Appendix.

conclusion, *i.e.*, that corporations incorporated in the United Kingdom Overseas Territories *are* citizens or subjects of the United Kingdom, and even within the Second Circuit itself there is substantial dissent regarding the propriety of the *Matimak* holding.

The controversy surrounding the *Matimak* decision stems from a fundamental defect in the appellate court's analysis. Although the court acknowledged that the United Kingdom rightfully could determine for itself which individuals and entities are its citizens or subjects, the court's examination of United Kingdom law as it bears on the status of Overseas Territories corporations was cursory and flawed. The court did not examine the constitutional relationship between the United Kingdom and its Overseas Territories, and it failed to recognize that governments of the Overseas Territories are products of legislation enacted in the United Kingdom, which retains sovereign authority over their continuing operations. To the extent that the *Matimak* court examined the law of the United Kingdom at all, it focused on two inapposite statutes – one governing only companies incorporated in Great Britain, and the other delineating the different categories of citizenship of natural persons. Neither of these statutes has any bearing on the nationality of companies incorporated in the Overseas Territories.

Other sources of U.K. law and practice, which the *Matimak* court did not consider, demonstrate that Overseas Territories corporations are indeed citizens or subjects of the United Kingdom, and should thus be able, under 28 U.S.C. § 1332(a)(2), to sue and be sued in the federal courts of the United States. Under the constitution of the British Virgin Islands – which was created pursuant to authority granted to Her Majesty by an Act of Parliament – the United Kingdom retains responsibility for and sovereignty over the affairs of the BVI

government and people. Although the constitution delegates lawmaking power to the BVI legislature, all local legislation is subject to the approval of Her Majesty's Government, and may be "disallowed" by the Crown at any time. All BVI laws – including BVI corporation laws – are therefore the products of an Act of Parliament, and have received Her Majesty's assent. Moreover, the BVI constitution reserves to the Queen the power to legislate directly for the "peace, order and good government of the Virgin Islands." Thus, although it has delegated some governmental functions to the BVI government, the United Kingdom clearly has retained its sovereign power over the British Virgin Islands as well as its corporations and inhabitants.

The United Kingdom also is internationally responsible for its Overseas Territories. As a result, it may exercise its sovereignty to protect Overseas Territories corporations in their relations with foreign countries, and to control their activities abroad. Other nations, including the United States, have acknowledged that the sovereignty of the United Kingdom extends to the Overseas Territories by entering into agreements with the United Kingdom concerning those territories. These agreements demonstrate both that the United Kingdom views the inhabitants and corporations of the Overseas Territories as its citizens or subjects and that other nations defer to this view.

Finally, *Matimak* was wrong in concluding that natural persons from the Overseas Territories are not citizens or subjects of the United Kingdom simply because the British Nationality Act 1981, c. 61 ("the 1981 Act") categorizes them as "British Dependent Territories citizens" rather than "British citizens" or "British subjects." The 1981 Act does not purport to define "citizens or subjects of the United Kingdom," and does

not contain an exhaustive list of persons entitled to that status. Statutes that use the term "United Kingdom national," however, do include citizens of the Overseas Territories within the definition. The distinctions drawn in the 1981 Act – which will soon be amended to include most "Overseas Territories citizens" within the definition of "British citizens" – do not alter the fact that the United Kingdom considers the inhabitants of the Overseas Territories to be United Kingdom citizens.

ARGUMENT

The court below did not conduct an independent evaluation of the defendant Traffic Stream's nationality, but held that it was constrained by its earlier decision in *Matimak* to conclude that all BVI corporations – and, by implication, all Overseas Territories corporations – are "stateless." Pet. App. 5a, 7a. The court correctly observed that, like Hong Kong at the time of *Matimak*, the British Virgin Islands is a British Dependent Territory.[4] *Id.* Because "[n]othing relevant to the alienage jurisdiction inquiry has changed" since its decision in *Matimak*, the court considered itself "bound to hold that Traffic Stream is not a citizen or subject of a foreign state," and that the district court therefore lacked jurisdiction over the action. *Id.*

In *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *amended*, 229 F.3d 424 (2d Cir.),

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[4] The court below acknowledged the United Kingdom Government's decision to refer to "Dependent Territories" as "Overseas Territories" and explained, correctly, that there is "no practical difference" between the two terms. Pet. App. 6a-7a n.1.

reh'g en banc denied, 229 F.3d 187 (2d Cir. 2000), the court similarly considered itself bound to follow *Matimak*, despite the expressed view of two of the three judges on that panel that *Matimak* – itself a divided decision – was wrongly decided. In that case, the Second Circuit held that Bermuda corporations and citizens are not citizens or subjects of the United Kingdom for purposes of the alienage diversity jurisdiction statute. *Id.* at 139. The court's amended opinion added a footnote explaining that Judges Cardamone and Newman felt "constrained by the precedential force of *Matimak*," and that, "[w]ere the question open in this Circuit, both would rule that citizens of Bermuda and other British Dependent Territories are sufficiently subject to the sovereignty of the United Kingdom to satisfy the alienage clause of the diversity statute . . . ." 229 F.3d at 424-25. Subsequently, three other judges on the Second Circuit dissented from the denial of a petition for rehearing *en banc*, indicating that they would overrule *Matimak*. 229 F.3d at 187-93 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing *en banc*); *id.* at 194 (Calabresi, J., dissenting from denial of rehearing *en banc*).

Thus, despite the fact that the Third, Fourth, and Seventh Circuits have all reached the opposite conclusion,[5] and despite the fact that several Second Circuit judges have concluded that *Matimak* was wrongly decided, *Matimak* stands as a formidable bar to the exercise of jurisdiction over corporations from the

[5] *See Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 413, 418 (3d Cir. 1999); *Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-43 (7th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991).

Overseas Territories in a jurisdiction that includes New York – the commercial center in the United States for international transactions.[6] *Matimak* should be overruled because its holding rests on a distorted view of the applicable law of the United Kingdom. As a matter of U.K. law, Overseas Territories corporations are subjects of the United Kingdom. Especially in light of the commercial and governmental interests at stake, *Matimak's* error regarding the substantive content of U.K. law should not be permitted to preclude United States federal courts from exercising alienage diversity jurisdiction over corporations from the Overseas Territories.

I. CORPORATIONS OF THE BRITISH VIRGIN ISLANDS ARE CREATED UNDER THE SOVEREIGNTY OF THE UNITED KINGDOM AND ARE THUS "CITIZENS OR SUBJECTS" OF THE UNITED KINGDOM FOR PURPOSES OF ALIENAGE DIVERSITY JURISDICTION

In holding that an Overseas Territory corporation could not bring suit in federal court because it was a "stateless" entity, the *Matimak* court rejected the view of the United States Justice Department, as *amicus curiae*, that the British Crown's "ultimate sovereign authority

[6] In addition to the decision below, other cases from the Second Circuit following *Matimak's* holding that corporations from the Overseas Territories are not citizens or subjects of a foreign state include *Universal Reinsurance Co. v. St. Paul Fire and Marine Ins. Co.*, 224 F.3d 139, 140-41 (2d Cir. 2000), *Klein v. Marriott Int'l, Inc.*, 34 F. Supp. 2d 176, 178-80 (S.D.N.Y. 1999), and numerous unpublished cases from the Southern District of New York.

over the plaintiff" rendered the plaintiff a subject of the United Kingdom. The court reasoned that "[t]he fact that the Hong Kong Companies Ordinance may be 'ultimately traceable' to the British Crown is too attenuated a connection" to support a finding that companies incorporated under that Hong Kong statute were citizens or subjects of the United Kingdom. 118 F.3d at 86. The court's statement reflects a fundamental misunderstanding of the relationship between the United Kingdom and the laws, inhabitants, and corporations of its Overseas Territories. As explained below, the statutes on which the *Matimak* court relied – the Companies Act 1948, c. 38, and the British Nationality Act 1981 – do not support the court's ruling that corporations from the Overseas Territories are "stateless." Moreover, other sources of U.K. law and practice clearly demonstrate that corporations from the Overseas Territories are subject to the sovereignty of the United Kingdom.

A. The *Matimak* Court's Reliance on the Companies Act and the British Nationality Act Was Misplaced, As Neither of Those Statutes Purports to Determine Which Entities Are Citizens or Subjects of the United Kingdom.

The *Matimak* court did not dispute that the United Kingdom, like any other nation, "is entitled to define who are its citizens or subjects." 118 F.3d at 85. In fact, it characterized this principle as "a truism," *id.*, and other U.S. authorities validate that characterization. *See, e.g.*, *United States v. Wong Kim Ark*, 169 U.S. 649, 668 (1898) ("Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."); *Sadat v.*

Mertes, 615 F.2d 1176, 1183 (7th Cir. 1980); 13B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3604, at 393 (2d ed. 1984). Thus, although the meaning of the phrase "citizens or subjects of a foreign state" under 28 U.S.C. § 1332(a)(2) is a question of U.S. law, the question whether a BVI corporation is in fact a "citizen" or "subject" of the United Kingdom is one that must be answered with reference to the law of the United Kingdom. The views of the United Kingdom on such questions are entitled to deference in the courts of the United States. *See, e.g., In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes substantial deference to the construction France places on its domestic law.").

In *Matimak*, the court looked to the British Nationality Act 1981 and the Companies Act 1948 to determine whether Overseas Territories corporations are citizens or subjects of the United Kingdom under U.K. law. *See* 118 F.3d at 85-86. Both of these statutes are inapposite, however, because neither purports to define the nationality of corporations from the Overseas Territories. Nor can either Act be said to contain an exhaustive list of entities and individuals who are citizens or subjects of the United Kingdom.

The *Matimak* court concluded erroneously that only companies incorporated under the Companies Act 1948 could be citizens or subjects of the United Kingdom. Because Hong Kong – like the British Virgin Islands – was not itself a foreign state, and because the Hong Kong company in that case was incorporated under a Hong Kong statute, the court decided that the company was a "stateless" entity. 118 F.3d at 84-86. But that reasoning is flawed. The Companies Act 1948 deals only with "British" companies, *i.e.*, companies incorporated in Great Britain (England, Wales, and Scotland), as

contrasted with "United Kingdom" companies. Thus, the Companies Act 1948 has no bearing on the nationality of companies from other parts of the United Kingdom outside Great Britain. Other companies that are unquestionably citizens or subjects of the United Kingdom, such as Northern Ireland corporations, are also not incorporated under the Companies Act 1948 and are thus not "British companies." Because Great Britain is not a recognized sovereign state, but rather a component of the United Kingdom, "British companies" – merely by virtue of their status as such – have no greater claim to U.K. nationality than Overseas Territories companies. The fact that local legislative bodies in various territories under the sovereignty of the United Kingdom have enacted their own companies legislation does not mean that Overseas Territories companies are any less citizens or subjects of the United Kingdom.

Nor, contrary to the holding in *Matimak*, does the British Nationality Act 1981 render Overseas Territories corporations "stateless." The Nationality Act, like the internal nationality legislation of most countries, concerns only natural persons. It does not purport to, and indeed does not, address the nationality of corporations in the United Kingdom.[7] Notwithstanding their omission from

[7] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 426 (5th ed. 1998) ("A major point of distinction [between individual and corporate nationality] is the absence of legislative provisions in municipal law systems which create a national status for corporations: domestic nationality laws do not concern themselves with corporations."); 1 OPPENHEIM, INTERNATIONAL LAW § 380 at 861 n.7 (9th ed. 1992) ("It is not usual for a state's internal law expressly to provide that a corporation has that state's nationality . . . .").

the Nationality Act, however, it is generally accepted that all "[c]orporations incorporated under the law in force in any part of H[er] Majesty's dominions" are properly considered United Kingdom nationals, and thus are citizens or subjects of the United Kingdom for alienage jurisdiction purposes.[8] *See* L-31 (Rule 1(a)(2) and 1(b), Rules Applying to International Claims, 7 Diplomatic Service Procedure Manual, Annex 1 (Mar. 1996)) (defining "United Kingdom national" to include "British Dependent Territories Citizens" and "[c]ompanies incorporated under the law of the United Kingdom or of any territory for which the United Kingdom is internationally responsible").

B. BVI Corporations Are Subject to the Sovereignty of the United Kingdom By Virtue of the Constitutional Relationship Between the British Virgin Islands and the United Kingdom.

According to *Matimak*, in U.S. law "a corporation is a 'citizen' or 'subject' of the entity under whose sovereignty it is created." *Matimak*, 118 F.3d at 79, 85 (citing *National Steamship Co. v. Tugman*, 106 U.S. 118, 121 (1882); RESTATEMENT (SECOND) OF THE FOREIGN

[8] The term "national" is a modern term that encompasses the meanings of both "citizen" and "subject." *See* J. MERVYN JONES, BRITISH NATIONALITY LAW AND PRACTICE 3-5 (1947). "Nationality" has been defined as "the legal tie which binds individuals to the State and entitles them to its protection in international relations, and also renders them subject to the personal jurisdiction of the State." *Id.* at 2. Because the terms "citizen" and "subject" are somewhat awkward when applied to corporations, the term "national" is sometimes used instead.

RELATIONS LAW OF THE UNITED STATES § 26 (1965)); *see Koehler*, 209 F.3d at 139. The dissenters in *Koehler* and in *Matimak* also focused on the extent to which the company in question was under the power of, or otherwise connected with, a foreign state. For instance, in her dissent from the denial of rehearing *en banc* in *Koehler*, Judge Sotomayor opined that "the drafters of the Constitution chose the words 'citizens' or 'subjects' to refer to the broad category of those under the authority of a foreign power." 229 F.3d at 191 (Sotomayor, J., dissenting from the denial of rehearing *en banc*); *see also id.* at 193 ("Dependent upon the law of the United Kingdom, Bermuda corporations exist under the sovereignty of the United Kingdom. They are, for purposes of 28 U.S.C. § 1332(a)(2), "subjects" of the United Kingdom."). Similarly, in the dissenting opinion in *Matimak*, Judge Altimari considered it significant that, "[f]or the past 155 years, Hong Kong was *inexorably linked* to Great Britain." 118 F.3d at 91 (Altimari, J., dissenting) (emphasis added). Thus, both sides of the debate regarding the nationality of Overseas Territories corporations appear to agree that the answer lies in the degree to which an Overseas Territories corporation – in this case, a BVI corporation – is subject to the sovereignty of the United Kingdom.

Contrary to *Matimak's* suggestion regarding the laws of Hong Kong (118 F.3d at 86), the relationship between the laws of the Overseas Territories and those of the United Kingdom is not merely that the former may in certain instances be "modelled on" the latter. Rather, the laws of the British Virgin Islands and other Overseas Territories owe their very existence to an Act of Parliament, which is the source of all local governmental authority. The West Indies Act 1962 authorized Her Majesty the Queen to establish a new government for the British Virgin Islands and other Caribbean territories:

> Her Majesty may by Order in Council make such provision as appears to Her expedient for the government of any of the colonies to which this section applies, and for that purpose may provide for the establishment for the colony of such authorities as She thinks expedient and may empower such of them as may be specified in the Order to make laws either generally for the peace, order and good government of the colony or for such limited purposes as may be so specified subject, however, to the reservation to Herself of power to make laws for the colony for such (if any) purposes as may be so specified.[9]

Pursuant to this Act of Parliament, the BVI constitution was granted by Order in Council in 1976. Under the constitution, the executive authority is vested in the Queen. Virgin Islands (Constitution) Order 1976, S.I. 1976 No. 2145 *see* § 13 [hereinafter "BVI CONST."]. The Queen is represented in the British Virgin Islands by a Governor, who is appointed to hold office "during Her Majesty's pleasure." *Id.* at § 3(1). All BVI local laws are subject to the approval of Her Majesty or Her representative in Her name. *Id.* at § 42. As contemplated by the West Indies Act, the BVI constitution reserves to Her Majesty the "full power to make laws for the peace,

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[9] West Indies Act 1962, c. 19 § 5(1). Section 5 of the West Indies Act applies to the colonies that, at the time of enactment, were included in the British Caribbean Federation, and to the Virgin Islands, which was not part of the Federation. *Id.* at § 5(6).

order and good government of the Virgin Islands." *Id.* at § 71.[10]

According to the BVI constitution, the legislature of the British Virgin Islands consists of "Her Majesty and a Legislative Council." BVI CONST. at § 25. The Legislative Council is composed mostly of elected members, and has the power "to make laws for the peace, order and good government of the Virgin Islands." *Id.* § 34. Subject to certain procedural requirements, however, the United Kingdom, acting through its representative the Governor of the BVI, has the legal authority to pronounce that a bill that has failed to pass in the Legislative Council will nonetheless take effect, either in the form in which it was introduced, or with amendments proposed in the Legislative Council or in a committee thereof. *Id.* at § 44. Conversely, laws passed by the Legislative Council – each member of which must swear allegiance to the Crown – may be "disallowed by

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[10] This power has been exercised on recent occasions. *See, e.g.*, The Caribbean Territories (Criminal Law) Order 2000 (decriminalizing homosexual acts between consenting adults in private); The Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991, S.I. 1991 No. 988 (enacted pursuant to §§ 5 and 7(3) of the West Indies Act 1962).

Section 7(3) of the West Indies Act 1962 sets forth the procedure applicable to Orders in Council made pursuant to the Act. If a statutory instrument contains an Order in Council that adapts or modifies an Act, it "shall be subject to annulment in pursuance of a resolution of either House of Parliament." A statutory instrument containing an Order in Council that does not adapt or modify any Act "shall be laid before Parliament after being made."

the Crown, by virtue of its prerogative, at any subsequent time." 6 HALSBURY'S LAWS OF ENGLAND ¶ 1037, at 514 (4th ed. 1991) [hereinafter HALSBURY'S LAWS]; BVI CONST. §§ 36, 43. The Governor, after consulting with the Chief Minister,[11] may dissolve the Legislative Council at any time. BVI CONST. at § 47(2). Finally, laws passed by the Legislative Council that are either repugnant to the BVI constitution, or to any Act of Parliament that applies to the British Virgin Islands, are void. The Colonial Laws Validity Act 1865 demonstrates clearly the overarching sovereignty of the United Kingdom.[12] For this reason, it is generally accepted that the legislatures of Overseas Territories do not have the power to amend their constitutions. *See generally* ELIZABETH W. DAVIES, THE LEGAL STATUS OF BRITISH DEPENDENT TERRITORIES 160-64 (1995).

It is clear from the foregoing that Her Majesty's Government remains sovereign over the British Virgin Islands notwithstanding its grant of certain governmental powers to local authorities. All BVI laws – including the

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[11] The Chief Minister is appointed by the Governor from the elected members of the Legislative Council in accordance with § 15(1) of the Constitution.

[12] The Colonial Laws Validity Act 1865 provides that "[a]ny colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." Colonial Laws Validity Act 1865, c. 63 § 2; *see also* BVI CONST. § 42(2)(c).

BVI Companies Act (CAP. 285) and the BVI International Business Companies Act (CAP. 291), under which BVI companies are incorporated – while enacted by the Legislative Council, are the products of an Act of Parliament, and have received Her Majesty's assent. These laws are not merely "ultimately traceable" to the Crown, they were passed under the authority of the Crown.

In concluding that Bermuda corporations and citizens were U.K. citizens or subjects, the dissent from the denial of rehearing in *Koehler* found the similar constitutional structure of Bermuda significant. Judge Sotomayor stressed that "'Bermuda and its government exist under the sovereignty of the Crown'" in that "[a]ll authority to make laws for the 'peace, order, welfare and good government of Bermuda' is granted to the Bermuda legislature solely by the United Kingdom, which regulates Bermuda lawmaking." 229 F.2d at 192 (Sotomayor, J., dissenting from denial of rehearing *en banc*) (quoting 6 HALSBURY'S LAWS ¶ 883). Similarly, the BVI government and BVI corporations (which are created under BVI laws) are properly viewed as subject to the sovereignty of the United Kingdom, and citizens or subjects of the United Kingdom within the meaning of 28 U.S.C. § 1332. There is no significant distinction between the BVI's constitutional relationship with the United Kingdom and the relationship between the United Kingdom and its other Overseas Territories.

C. The Sovereignty of the United Kingdom Over Overseas Territories Corporations Is Manifested by the Fact That the United Kingdom Is Internationally Responsible For Those Territories and Their Inhabitants.

In granting powers to the local BVI government, Her Majesty's Government retained full authority over crucial areas of policy in the territories, most importantly international relations and defense, including the armed forces. *See* BVI CONST. § 19 (bestowing responsibility for these and other areas on the Governor); *see also* DAVIES, *supra*, at 80, 81, 207 (1995); 6 HALSBURY'S LAWS, *supra*, ¶¶ 983, 1080; SIR KENNETH ROBERTS-WRAY, COMMONWEALTH AND COLONIAL LAW 266-67 (1966). As a result, Her Majesty's Government in the United Kingdom remains internationally responsible for the Overseas Territories. One consequence of this responsibility is that "the acceptance by the United Kingdom of an international convention will create international obligations and liabilities on the part of the United Kingdom in respect of the [Overseas Territories] unless the territorial application of the convention is expressly or impliedly limited to the United Kingdom or to a portion of those dependencies." 6 HALSBURY'S LAWS, *supra*, ¶ 983 at 472. To satisfy these international obligations, the United Kingdom can and often does pass legislation directly affecting the rights and duties of individuals and corporations resident within the Overseas Territories.

The United Nations Act 1946, for instance, empowers Her Majesty by Order in Council to make such provision as appears necessary or expedient for enabling measures that the Security Council of the United Nations call upon Her to make. With certain exceptions not relevant here, any such order may extend "to any part of [Her]

Majesty's dominions." United Nations Act 1946, c. 45 § 2. The Queen in Council has exercised this power frequently in recent years, for example to implement in the Overseas Territories the obligation to comply with U.N. sanctions. *See, e.g.*, The Libya (U.N. Sanctions) (Dependent Territories) Order 1993, S.I. 1993 No. 2808; The Iraq and Kuwait (U.N. Sanctions) (Dependent Territories) Order 1990, S.I. 1990 No. 1652; s*ee generally* DAVIES, *supra*, at 233 & n.13. Such "sanctions orders" typically impose criminal liability on the owners or charterers of ships or aircraft used to transport restricted goods to the sanctioned country. The sanctions orders are applicable to ships or aircraft registered in the Overseas Territories to which they apply, and to "any other ship or aircraft that is for the time being chartered to any person who is (a) . . . a British Dependent Territories citizen, . . . or (b) a body incorporated or constituted under the law of the [Overseas] Territory." *E.g.*, The Liberia (U.N. Sanctions) (Overseas Territories) Order 2001, S.I. 2001 No. 946 § 6; The Al-Qa'ida and Taliban (U.N. Measures) (Overseas Territories) Order 2002, S.I. 2002 No. 112 § 6.

Other Acts of Parliament provide that Her Majesty in Council may extend the application of the Act to the Overseas Territories and to the extraterritorial actions of "bod[ies] incorporated under the law of . . . any colony."[13] *See, e.g.*, Anti-Terrorism, Crime and Security

[13] "Colony" means (in statutes passed after 1978) "any part of Her Majesty's dominions outside the British Islands except (1) countries having fully responsible status within the Commonwealth, (2) territories for whose external relations a country other than the United Kingdom is responsible, or (3) any associated state." 6 HALSBURY'S LAWS ¶ 805 (footnotes omitted). In modern practice, the terms "Dependent Territory" and now "Overseas Territory" have replaced the term "colony."

Act 2001, c. 24 §§ 44(3), 51(2), 57; Landmines Act 1998, c. 33 §§ 3(4), 29(4); Chemical Weapons Act 1996, c. 6 §§ 3(3), 39(3); Deep Sea Mining (Temporary Provisions) Act 1981, §§ 1(5), 18(6). This power of extension is exercised through subsequent statutory instruments entered by Her Majesty in Council. *See, e.g.*, Landmines Act 1998 (Overseas Territories) Order 2001, S.I. 2001 No. 3499 sch. § 1 3(3) (extending provisions of the Landmines Act to corporations incorporated in the British Virgin Islands and other territories); Deep Sea Mining (Temporary Provisions) Act 1981 (Guernsey) Order 1997, S.I. 1997 No. 2978 (applying Section 1 of the Act to Guernsey corporations).

These instances of direct regulation by the Government of the United Kingdom of the extraterritorial behavior of Overseas Territories corporations and individuals reflect the United Kingdom's sovereignty over such entities and persons. As a general rule, a state may regulate the extraterritorial behavior of only its own nationals. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987) [hereinafter RESTATEMENT] ("[A] state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory . . . ."); *id.* § 213 cmt. b (explaining that corporate nationality is relevant under international law because "[a] state may exercise jurisdiction to prescribe laws for acts of its corporate nationals committed outside of its territory"); JONES, *supra*, at 1-2 (noting that "personal jurisdiction" over persons,

including the right to protect them and to legislate with respect to their conduct abroad, is based upon nationality).

In addition to regulating the extraterritorial acts of Overseas Territories corporations, the United Kingdom has included such corporations among those persons whose interests are protected against the acts of foreign states. *See* JONES, *supra*, at 288 ("It is the practice of His Majesty's Government in the United Kingdom to protect, as against foreign Powers, . . . [c]orporations owing their existence to the law in force in the United Kingdom and colonies."). For example, the Protection of Trading Interests Act 1980, c. 11 § 6, provides corporations incorporated "in a territory outside the United Kingdom for whose international relations Her Majesty's Government in the United Kingdom are responsible" with a cause of action to recover in certain circumstances that portion of a damage award, entered against such corporation by courts in other countries, that exceeds single compensatory damages. Moreover, the United Kingdom's Rules Applying to International Claims expressly define the term "United Kingdom national" to include "[c]ompanies incorporated under the law of the United Kingdom or any territory for which the United Kingdom is internationally responsible." L-31 (Rule 1(b), Rules Applying to International Claims, 7 Diplomatic Service Procedure Manual, Annex 1 (Mar. 1996)). The fact that the United Kingdom considers itself responsible for the protection of Overseas Territories corporations in the international realm is another indication that such corporations are subject to the sovereignty of, and thus citizens or subjects of, the United Kingdom. *See* BROWNLIE, *supra*, at 406 (explaining that, with a few exceptions, "states may only exercise diplomatic protection in respect of their nationals"); RESTATEMENT, *supra*, § 213 cmt. b (noting that a state may make a claim for injury done to its corporate nationals by another state);

JONES, *supra*, at 2 (noting that a state's right to protect persons outside its territory is based upon nationality).

D. The United Kingdom's Sovereignty Over Its Overseas Territories Is Internationally Recognized, as Evidenced in Many Bilateral Treaties, Including Those With the United States.

The international community recognizes the United Kingdom's authority to enter into agreements on behalf of its Overseas Territories. Such agreements reflect the United Kingdom's responsibility for its Overseas Territories, and the inhabitants and corporations thereof, as well as the widespread international acknowledgment of this close relationship. Bilateral treaties entered into by the United Kingdom on behalf of its Overseas Territories directly affect the rights and obligations of Overseas Territories corporations in a wide variety of ways by, for example, protecting investments in foreign countries made by Overseas Territories corporations,[14] and by settling such corporations' claims against foreign governments.[15] Many of these bilateral agreements

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[14] *See, e.g.*, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Sri Lanka for the Promotion and Protection of Investments, Feb. 13, 1980, 19 I.L.M. 886 (1980) (extended to Hong Kong by virtue of an Exchange of Notes with effect as of Jan. 14, 1981) (providing that the investments of nationals of one contracting Party "shall enjoy full protection and security in the territory of the other Contracting Party").

[15] *See, e.g.*, Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Socialist Republic of Romania Relating to

expressly define the term "United Kingdom nationals" to include Overseas Territories corporations,[16] which are entitled to enforce their rights under the agreements in the appropriate forum. *See Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, 30 I.L.M. 577 (ICSID June 21, 1990) (resolving claim of Hong Kong corporation in arbitration pursuant to United Kingdom's accession to the International Convention for the Settlement of Investment Disputes).

The United States itself has expressly recognized the United Kingdom's sovereignty over its Overseas Territories and the inhabitants and corporations thereof. The Consular Convention between the United States and the United Kingdom applies to "all [Her] Majesty's colonies and protectorates" and defines United Kingdom "nationals" to include "all juridical entities duly created under the law of any of those territories." Consular Convention, June 6, 1951, U.S.-U.K., arts. 1(2) and 2(4), 3 U.S.T. 3426. In addition, bilateral treaties between the United States and the United Kingdom reflect the understanding of the United States that the United Kingdom is sovereign over its Overseas Territories in the area of international affairs, and must act on their behalf

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the Settlement of Certain Financial Matters, London, Jan. 12, 1976, U.K.T.S. No. 9 (1976) (Cmnd. 6376) (settling claims of United Kingdom nationals against Romania regarding expropriated property and outstanding debt).

[16] *See, e.g., id.* at art. 2, §§ (1)(a)(ii), (1)(b)(ii) (defining the term "United Kingdom nationals" to include "corporations . . . constituted under the laws in force in . . . any territory for the international relations of which the United Kingdom Government are . . . responsible").

in dealing with other nations.[17] These treaties made between the United States and the United Kingdom may directly affect the rights and obligations of corporations and inhabitants of the Overseas Territories, as well as their governments. For example, in an agreement with the United Kingdom regarding Reciprocal Fisheries, the

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[17] Examples of the many bilateral treaties between the U.S. and U.K. regarding U.K. Overseas Territories include: Agreement Concerning Maritime and Aerial Operations to Suppress Illicit Trafficking by Sea in Waters of the Caribbean and Bermuda, July 13, 1998, U.S.-U.K. U.K.T.S. No. 2 (2001) (Cm. 5031) (not yet in force); Treaty Concerning the Cayman Islands and Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S.-U.K., 26 I.L.M. 536 (1987) (extended to the British Virgin Islands and other territories by exchange of notes dated Nov. 9, 1990, T.I.A.S. 11765); Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (on Behalf of the Government of Bermuda) Relating to the Taxation of Insurance Enterprises and Mutual Assistance in Tax Matters, July 11, 1986, T.I.A.S. 11676; Extradition Treaty, June 8, 1972, U.S.-U.K., 28 U.S.T. 227 (extended to the British Virgin Islands and other territories "for the international relations of which the United Kingdom is responsible" by exchange of notes dated Oct. 21, 1976); Agreement Concerning Alien Amateur Radio Operators, Nov. 26, 1965, U.S.-U.K., 16 U.S.T. 204 (extended to territories "for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland is responsible" by exchange of notes dated Dec. 11, 1969, 20 U.S.T. 4089); Agreement for Technical Co-Operation in Respect of the Territories for the International Relations of which the Government of the United Kingdom are Responsible, July 13, 1951, U.S.-U.K., 2 U.S.T. 1307.

United States granted BVI commercial fishing vessels the right to operate within the exclusive fishery zone of the United States. Reciprocal Fisheries Agreement, June 24, 1977, U.S.-U.K., art. II, 29 U.S.T. 5653 (terminated by its terms Dec. 31, 1978). A very recent such Agreement deals with the exchange of tax information between the United States and the Cayman Islands with respect to, *inter alia*, Cayman Islands and United States companies, partnerships, and other persons.[18]

It is doubtful that the United Kingdom would make such arrangements with the United States and other nations on behalf of entities that it did not consider its citizens or subjects. *See* JONES, *supra*, at 2 ("As a state is usually only concerned with the interests of its own nationals, it commonly stipulates, in treaties, for benefits restricted to such nationals."). The agreements discussed above show that the United States and other nations also recognize the sovereignty of the United Kingdom over corporations and citizens of the Overseas Territories. This recognition, like the stated position of the United Kingdom, is entitled to deference from the courts.

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[18] Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the Cayman Islands, for the Exchange of Information Relating to Taxes, November 27, 2001 (not yet in force).

II. NATURAL PERSONS WHO ARE CITIZENS OF THE OVERSEAS TERRITORIES ARE ALSO NATIONALS OF THE UNITED KINGDOM

The *Matimak* court's reliance on the British Nationality Act 1981, in holding that an Overseas Territories corporation is not a citizen or subject of the United Kingdom, was misplaced. As explained above, the 1981 Act – which deals only with natural persons, and not corporations – obviously has no bearing on the precise question before this Court. But, even with respect to natural persons, *Matimak* was incorrect in suggesting that the Act demonstrates that "Dependent Territories citizens" under the Act are not citizens or subjects of the United Kingdom for alienage diversity jurisdiction purposes. As an initial matter, the court of appeals was simply wrong in stating that the Act "clearly distinguishes between citizens of the United Kingdom and citizens of 'British Dependent Territories.'" 118 F.3d at 86. In fact, the Act classifies natural persons into several groups, one of which is "British Dependent Territories citizen," and another of which is "British citizen" – but the term "citizen of the United Kingdom" is not used. Moreover, it is widely recognized that the phrase "British Dependent Territories citizen" is used to classify a particular kind of United Kingdom national – one whose nationality stems from a connection with one of the Overseas Territories rather than with the metropolitan United Kingdom itself. *See* 4(2) HALSBURY'S LAWS ¶ 31.

Although, as the *Matimak* court noted, British Dependent Territories citizens do not currently enjoy rights identical to those of "British citizens" under that Act, "[t]he distinctions of municipal law between various types of nationality do not affect the general conception of nationality as accepted in international law and usage." JONES, *supra*, at 289; *see* BROWNLIE, at 400 ("[I]n the

case of the United Kingdom, the position is that the inhabitants of dependencies, whatever their internal status under the British Nationality Act 1981, are considered to have the status of national for purposes of international law.") In any event, a Bill currently before Parliament will soon minimize the distinction by granting "British citizenship" to most British Dependent Territories citizens, in addition to their existing citizenship. *See* British Overseas Territories Bill [HL], *as introduced on* June 21, 2001, §§ 2(1), 3 (*available at www.parliament.the-stationery-office.co.uk/pa/pabills.htm*).

Even in the absence of such legislation, however, it is clear that British Dependent Territories citizens are properly considered United Kingdom nationals, and thus "citizens or subjects of a foreign state" under the alienage diversity jurisdiction statute. Numerous U.K. statutes define "nationals of the United Kingdom" to include Dependent Territories citizens, and reflect the United Kingdom Government's understanding that such persons are not "stateless." *See, e.g.*, Anti-Terrorism, Crime & Security Act 2001, c. 24 §§ 44, 81(3) (defining "United Kingdom National" as including "a British Dependent Territories citizen"); Landmines Act 1998, c. 33 § 3(5) (same); British Nationality (Hong Kong) Act 1997, c. 20 § 1(2) (allowing certain categories of natural persons to register as British citizens, including a person who "was a British Dependent Territories citizen by virtue only of his having a connection with Hong Kong," and who "*would have been a stateless person if he had not been such a citizen*") (emphasis added). The 1981 Act does not, as the *Matimak* court suggested, render natural persons from the Overseas Territories – much less Overseas Territories corporations – stateless.

Finally, this Court has held that the United States Constitution incorporated the principle that citizenship is conferred by virtue of birth within the territory of a State, which stems from the common law rule that "all persons born under British dominion" are British subjects. *Wong Kim Ark*, 169 U.S. at 657, 693; *see also Inglis v. Trustees of the Sailors' Snug Harbor*, 28 U.S. 99, 120 (1930) ("It is universally admitted, both in the English courts and in those of our own country, that all persons born within the colonies of North America, while subject to the crown of Great Britain, were natural-born British subjects . . . ."); *Wong Kim Ark*, 169 U.S. at 657 ("By the common law of England, every person born within the dominions of the crown . . . was an English subject, save only the children of foreign ambassadors, . . . or a child born to a foreigner during the hostile occupation of any part of the territories of England.") (quoting SIR ALEXANDER JAMES EDMUND COCKBURN, NATIONALITY 7 (1869)). Although the *Wong Kim Ark* Court was addressing the meaning of "citizens of the United States" under the Fourteenth Amendment to the U.S. Constitution, the principle is equally applicable to the reference to "foreign . . . Citizens or Subjects" in Article III. Thus, it is entirely consistent with the Framers' intent that a person born in an Overseas Territory of the United Kingdom is a "citizen" or "subject" of the United Kingdom – a foreign state – and is entitled to invoke and be subject to the alienage diversity jurisdiction of the United States federal courts.

CONCLUSION

In Diplomatic Notes and multiple *amicus curiae* briefs, the Government of the United Kingdom has consistently taken the position that companies incorporated under the laws of its Overseas Territories are citizens or subjects of the United Kingdom. The United

Kingdom has thus urged the courts of the United States to provide a neutral federal forum for the resolution of disputes between these companies and U.S. nationals. Under principles of international comity, the position of the U.K. Government on the nationality of its Overseas Territories corporations should be accorded substantial weight by this Court. Moreover, the wealth of evidence indicating that Overseas Territories corporations are subject to the sovereignty of the United Kingdom strongly supports the conclusion that such corporations are citizens or subjects of the United Kingdom within the meaning of the alienage diversity jurisdiction statute. The judgment of the court of appeals dismissing the suit for lack of subject matter jurisdiction therefore should be reversed, and the case should be remanded for further proceedings on the merits.

Respectfully submitted,

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